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CASES

ARGUED AND DETERMINED

IN

The Court of Common Pleas.

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CASES

ARGUED AND DETERMINED

IN

The Court of Common Pleas,

WITH TABLES OF THE NAMES OF THE CASES ARGUED AND CITED,
AND OF THE PRINCIPAL MATTERS.

By JAMES MANNING,
SERJEANT AT LAW,
AND
T. C. GRANGER,
OF THE INNER TEMPLE, ESQUIRE, BARRISTER AT LAW.

VOL. I.

FROM EASTER TERM TO MICHAELMAS TERM, 1840,
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JUDGES

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DURING THE PERIOD CONTAINED IN THIS VOLUME.

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The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.

The Right Hon. Sir THOMAS ERSKINE, Knt.

Hon. Sir THOMAS COLTMAN, Knt.

Hon. Sir WILLIAM HENRY MAULE, Knt.

ATTORNEY GENERAL,

Sir JOHN CAMPBELL, Knt.

SOLICITOR GENERAL,

Sir THOMAS WILDE, Knt.

A

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ADDENDA ET CORRIGENDA.

Page 39. note (*b*), after "22 *E.* 4, fo. 30," add "*S. C.* in error, *M.* 2 *R.* 3, fo. 2, pl. 7."
242. note (*a*), for "*R. E.* 1 *Vict.*" read "*R. T.* 1 *Vict.*"
243. note (*d*), for "judgment order" read "judge's order."
249. note (*g*), for "declaration" read "plea."
360. line 27. for "defendant" read "plaintiff."
34. for "defendants" read "plaintiff."
472. line 5. for "How could he do that" read "How could that be done."
584. note (*a*), after "Duchess of *Lancaster*" add "(to use a popular and intelligible, but not very accurate, term)."
695. side note, for "that impounding" read "that the impounding."
710. side note, for "*S. S.*" read "*J. S.*"
744. lines 6. and 8. from bottom, *dele* "the replication to."

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS, 1840.

IN

Easter Term,

IN THE

THIRD YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in Banc during this Term were,

TINDAL C. J.	ERSKINE J.
BOSANQUET J.	MAULE J.

ROBERT BRUCE the younger, Plaintiff in Error, *v.* WILLIAM KILLEGREW WAIT and SAMUEL JAMES, Defendants in Error. *January* 24. and *May* 1.

A custom in an inferior court to issue process of foreign attachment, for the purpose of compelling the appearance of the defendant, without a previous summons, is bad.

A record, by which it appears that process of foreign attachment issued upon a plaint, without an intervening summons and return of *non est inventus et*

THE issue in error first set out the enrolment of a writ of error, requiring the recorder of the borough (*a*) of the city and county of *Bristol* and judge of

(*a*) Every city is a borough, *Co. Litt.* 109.; but the Municipal Corporation Act, 5 & 6 *W.* 4. *c.* 76., having used the

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nihil habet, is erroneous.

the Tolzey court, there to have before his late *Majesty's* justices at *Westminster* (*a*) the record and process of a plaintiff in an action of debt by attachment, in which *William Killegrew Wait* and *Samuel James* were plaintiffs, one *John Coombe* was defendant, and *Robert Bruce*, the younger was claimant, of certain goods and chattels

The claimant of the goods attached, against whom it has been considered in the court below, that judgment be entered for the plaintiffs (for whom a verdict had been found upon a counter-plea of the claim), may bring a writ of error although the original defendant has not appeared.

A plaintiff in error, who has assigned error in fact, to which *in nullo est erratum* is pleaded, may insist upon errors of law apparent on the record, and stated in the margin of the paper book.

Quære, whether the adding of the *similiter* by the party who takes an issue, is a joining of issue within 21 *Jac.* 1. *c.* 23. *s.* 2.

Quære, whether the entry of a claim to goods taken under process of foreign attachment is tantamount to an arrest or an appearance, from which the six weeks for joining issue are to be calculated under 21 *Jac.* 1. *c.* 23. *s.* 2.

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word "borough" only when making provision for the government of the places mentioned in the schedules to that act, some of which are cities, it has been usual since the passing of that act to add the word "borough," and to transform the citizens into "burgesses." Thus, the city of *Bath* is now styled the city and borough of *Bath*, and the corporate body is called the mayor, aldermen, and burgesses of *Bath*. The interpretation clause, sect. 142., enacts, "that in the construction of the act, the word 'borough' shall be construed to mean city, cinque port, or town corporate, named in the schedules; and the word 'burgess' shall be construed to mean citizen, in the case of a city." One of the objects of this clause would appear to be to prevent its being supposed that by using the terms "borough and burgesses" it was intended that such incongruous designations as "borough and city," and "burgesses of the city," should be adopted.

(*a*) This writ of error was made returnable in the Court of Common Pleas rather than in the Queen's Bench, upon a supposition that it would be heard two years earlier in the former court than in the latter. That error lies from an inferior court into the Court of Common Pleas appears from several authorities. *Fitzherbert* (of whose treatise *Willes* C. J. says, that it is a work of the greatest authority, *Willes* 120.) states, that if false judgment be given in *London* (*post*, 6 (*a*) *Cro. Jac.* 538., except in the sheriff's court, from which error lies to the mayor's court, and in the mayor's court, from which it lies to judges delegates, *F. N. B.* 22 H.; 1 *Rot. Parl.* 316 a) or other place, which is a court of record, the party grieved shall

attached as the goods and chattels of *J. Coombe*. Then followed the transcript under the seal of the recorder.

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BRUCE v. WATT.

Transcript.

City, and county of the city of *Bristol*, to wit, Pleas in the court of our Sovereign Lady the Queen of the Tolzey of the city and county of *Bristol*, holden at the Guildhall of the same city according to the law

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have a writ of error, and the writ may be returned into the Common Pleas, or in the King's Bench, at the pleasure of him who sueth the same, *F. N. B.* 20 D.; so again, *F. N. B.* 21 G.; and the law, as laid down by *Fitzherbert*, is expressly cited and recognised by *Dyer* C. J. in *Dyer*, 250.; and in *Carter*, 222., *Vaughan* C. J. says, "A writ of error out of an inferior court lies *properly here*, as in the King's Bench; but generally writs of error, for many years, have *not* been brought *here*. The reason is matter of conveniency; because, if you bring a writ of error here and the judgment is affirmed, yet it may be brought into the King's Bench and be reversed; though, indeed, if a writ of error be brought here, we must proceed upon it. But no man will advise his client to bring it here, but rather into the King's Bench, where it is final." (The two courts are now placed upon the same footing in this respect). So in *Comyns's Digest*, tit. *Pleader* (3 B. 2.), and in *Bacon's Abr.* tit. *Error* (I.) 5., the passage in *F. N. B.* is referred to as clear law; and in *M.* 19 *H.* 6. fo. 12. pl. 31., *Newton* C. J. C. P. says, "Error in county palatine should be redressed *here*." In *Gilbert's Common Pleas* it is said, "The courts of *Westminster* are the superior courts in the kingdom, and have a superintendency over all the other courts; by prohibition, if they exceed their jurisdiction, or by writ of error and false judgment, if their proceedings are erroneous." No distinction is here made between writs of error and writs of false judgment, and it is notorious that a writ of false judgment lies in C. P. *Vide 2 Inst.* 138.

The ouly original authority which has been found against the jurisdiction of the Court of C. P. in error, is the following short note in *Cro. Eliz.* 26., *Roe* v. *Hartley*: — "It was held by all the justices that a writ of error doth not lie in the Common Pleas upon an erroneous judgment given in any inferior court of record, and this was, as they said, upon great advice." A reference is added "*F. N. B.* 20 D. *contrà, vide Dyer*, 250." It does not appear from this report upon what occasion the opinion there stated was expressed. From the reference to *Dyer*, 250., and, in the margin to *Moore*, 78. (*Price* v. *Jones*; *S. C.* 1 *Anderson*, 12.; *Benlowes*, 40. pl. 161.) it may perhaps be inferred that in *Roe* v. *Hartley* the question was, whether error lay in C. P. upon a judgment in an assize, which was resolved in the negative. The reason is given in *Dyer*, 250.; being, that the justices of assize are appointed by the King's

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merchant, and according to the use and custom of the city aforesaid, from the time whereof the memory of man is not to the contrary in the same used and approved, and according to the liberties and privileges of the same city by divers charters of the progenitors of his present Majesty, granted to the mayor and commonalty of the city aforesaid, before Sir *Charles Wethcrell*, knight, recorder of the said city, and judge of the said court of the Tolzey, (to wit) on *Monday*, the 30th day of *January*, in the seventh year, &c., and in the year of our Lord 1837, the said Sir *C. Wetherell*, knight, then and there being judge of the same court:

Plaint.

To this court came *W. K. Wait* and *S. James* in their proper persons, and, according to the custom of the city aforesaid, affirmed their certain plaint against *John Coombe*, in a plea of debt upon demand of 1100*l.* of

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patent. Strictly speaking, the opinion in *Roe* v. *Hartley* must have been extra-judicial, inasmuch as whatever the case before the Court may have been, a general opinion as to *no* writ of error lying in the C. P. cannot have been really necessary. The late text writers, *Blackstone* (3 *Commentaries*, 410.), Serjt. *Williams* (2 *Wms. Saund.* 101 *b.*), and *Tidd* (*Practice*, 9th ed. 1137, 1138.), also deny the jurisdiction of the Court of Common Pleas in writs of error from inferior courts of record. But these writers, without appearing to be aware of the authorities above cited in support of the jurisdiction, rely upon the case in *Cro. Eliz.* 26. (*Roe* v. *Hartley*), upon the case in *Dyer*, 250., in which it was held that error does not lie in C. P. upon judgments given by justices of assize appointed by the king's patent, and upon *Finch's Common Law*, 238., where it is said that writs of error shall always be brought in K. B., for which position no authority is vouched but 14 *H.* 7. 1 *b.*, which (*M.* 14 *H.* 7, fo. 1, pl. 4.) merely shews that in that particular case error was brought in K. B. upon a judgment in *Exeter*, nothing being said as to the necessity or even the propriety of suing in that Court rather than in C. P. *Finch*, however, goes on to say, "And a writ of error shall never be brought in C. P.;" for which he vouches only *Dyer*, 250., the case already mentioned.

The opinion that error lies in the Common Pleas from the courts of a county palatine appears to have been controverted by *Hillary* J., *M.* 14 *E.* 3., *Fitz. Abr. Error*, pl. 6.

In *Spink* v. *Bishop of Ely*, 21 *Edw.* 3., 2 *Rot. Parl.* 192. *a. b.*, a writ of oyer and terminer was directed to be removed into K. B. or C. P. at the election of the defendant.

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lawful money of *Great Britain*, and the said *W. K. Wait* made oath, by affidavit in writing, to 550*l.* and upwards of like lawful money, and, in the same court, found pledges to prosecute their said plaint, (to wit) *John Doe* and *Richard Roe*, and thereupon the said *W. K. Wait* and *S. James* put in their place *Meshach Brittan*, their attorney, against the said *J. Coombe* in the plea aforesaid; and in the same court there, by their said attorney, sought process of foreign (*a*) attachment of the same court, to be made thereupon against the said *J. Coombe*, according to the custom of the city aforesaid, from the time aforesaid used and approved in the same: whereupon, at the request of the said *W. K. Wait* and *S. James*, made by their said attorney, according to the custom of the city aforesaid, it was commanded by the same court here to all officers of the said court of the Tolzey, and also all constables whatsoever, that they should attach the said *J. Coombe* by his goods and chattels, so that he should be at the next court after the attachment in the Guildhall aforesaid, to answer to the said *W. K. Wait* and *S. James* in the plea aforesaid; and afterwards, to wit, at the court of our said Lord the King of the Tolzey of the city aforesaid, here in the Guildhall of the city aforesaid, according to the custom of the city aforesaid, on the 14th day of *February* in the year aforesaid, *Richard Pointing*, one of the officers and minister of the said court of the Tolzey, returned and certified to the said court, upon the precept last mentioned, that he, by virtue of that writ to him in form aforesaid directed, had attached the said *J. Coombe* by 3388 bushels of oats, being the proper goods and chattels of the said *J. Coombe*, to answer the said *W. K. Wait* and *S. James* of their aforesaid plea of plaint, according to the custom aforesaid, and that he had the same in his custody; and afterwards at the court of our

Affidavit of one plaintiff for 550*l.*

Process of foreign attachment prayed.

Process awarded.

Attachment returned.

(*a*) As the goods are not alleged to have been in third hands, this term seems to be improper.

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said Lord the King of the Tolzey, holden, according to the custom of the city aforesaid, here in the Guildhall aforesaid, on *Friday*, the 17th day of *February* in the year aforesaid, came *Robert Bruce* the younger, and put in his place *Brooke Smith*, his attorney, and in the same court there by his said attorney claimed the property of all the goods and chattels aforesaid and every part thereof, and alleged that the property of the same at the time of the attachment made was and on the said 17th day of *February* in the year aforesaid still was in him the said *R. Bruce*, and not in the said *J. Coombe*, as by the attachment aforesaid is above supposed. And that this he was ready to verify; wherefore the said *R. Bruce* then prayed judgment, and a return of the said goods and chattels aforesaid to be adjudged to him, and so forth. And afterwards, at the court of our said Lord the King of the Tolzey of the city aforesaid, holden here in the Guildhall aforesaid, according to the custom of the city aforesaid, on *Friday*, the 24th day of *February* in the year aforesaid, and after eight clear days, including therein four court days, had elapsed after the said 14th day of *February* in the year aforesaid, according to the custom and practice of the said court, the said *W. K. Wait* and *S. James*, by their said attorney, in the same court, declaring upon the plaint aforesaid in the plea aforesaid against the said *J. Coombe*, according to the custom of the city aforesaid, say, That whereas the said *J. Coombe*, on the 2d day of *January* then last past, here, at the city of *Bristol*, in the ward of *All Saints*, there, within the jurisdiction of this court, granted to pay (*a*) to them, the said *W. K. Wait* and *S. James*,

Claim of property.

Declaration against defendant.

Concessit solvere.

Concessit solvere in *Tower* of *London*.

(*a*) The nature of this proceeding will appear by the following record of an action upon a *concessit solvere* commenced before the Constable and Lieutenant of the *Tower* of *London* in 1486, and removed into the Court of Common Pleas (*antè*, 2 *n.*) in 1507. "The Lord the King hath sent to His beloved and faithful *R. R.* (Sir *Robert Read*), knt., and his companions, justices of the said Lord the King of the Bench, His writ close

Mittit into C

1100*l.*, of, &c. for divers sums of money from the said *John* to the said *W. K.* and *S.* before that time there

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in these words: —*Henry*, &c. to His beloved and faithful *R. R.*, knight, and his companions and justices of the Bench, greeting: —We send you inclosed in these presents the record and process of a certain plea, which was before the Constable of Our *Tower* of *London* and his Lieutenant there, between *F. M.* and *R. C.*, of debt of 20*l.* which the said *F.* demands from the said *R. C.*, as it is said, which We caused to come before Us in Our Chancery, commanding, that having inspected the record and process aforesaid, you further cause to be done on the prosecution of the said *F.* as of right, and according to the law and custom of Our kingdom of *England*, ought to be done. Witness Myself, &c."—The record and process of the plea, whereof mention is made in the said writ, follows in these words: —"*Tower* of *London*, Court of the Lord the King, held there before *R. C.*, knight, Lieutenant of *J.*, Earl of *O.*, Constable of the said *Tower*, according to the custom of the said *Tower*, used from time whereof memory is not extant, on the 18th day of *November*, in the 1st year of the reign of King *Henry* VII., *F. M.* complains against *R. C.* of a plea of debt upon demand of 20*l.*, and finds pledges of prosecuting that plaint, to wit, *J. S.* and *R. C.*; wherefore, upon the petition of the said *F.*, according to the custom of the *Tower* aforesaid, used in the same, from time whereof the memory of man is not extant, it is commanded to *J. W.*, sub-auditor of the *Tower* aforesaid, that he take the said *R.* by his body, if, &c., so that he may have his body here without delay, to answer the said *F.* of the plea aforesaid, &c., afterwards, to wit, at the same court, held on the 16th day of *May* here, to wit, at the *Tower* aforesaid, before the said *R.*, Lieutenant, &c., according to the custom aforesaid, come as well the said *F.* in her own person as the said *R.* taken by *J. P.* by pretext of the precept aforesaid in his own person; and hereupon the said *F.* complains against the said *R.*, for that the said *R.* unjustly detains from and does not render to the said *F.* 20*l.* which he owes her and unjustly detains: For that whereas divers variances, suits, and discords, were for a long time moved and pending between the said *F.* of the one part, and the said *R.* on the other part, for divers trespasses and offences to the said *F.*, by the said *R.* perpetrated, for which the said *F.* had sought of the said *R.* sufficient amends to be made to her; the said *R.*, not ignorant of the premises, willing to satisfy the said *F.* for those trespasses, on the 12th day of *A.*, in the year, &c., at the *Tower* Wharf, within the jurisdiction of this court, *granted to pay* to the said *F.* the said 20*l.*, in satisfaction of the trespasses aforesaid, to be paid to

Tower record cut.

Declaration.

Accord.

Concessit solvere.

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due and then being unpaid, to be paid to the said *W. K.* and *S.*, when the said *John* should be thereunto afterwards requested. Yet the said John, although often requested, &c., the said sum of 1100*l.* or any part thereof to the said *W. K.* and *S.* hath not yet paid; but to pay the same to them, the said *W. K.* and *S.* hath hitherto altogether refused, and still doth refuse, to the damage of the said *W. K.* and *S.* of 1100*l.*, and therefore they bring suit and so forth; and afterwards at the court of our said Lord the King of the Tolzey of the city aforesaid, on *Monday*, the 10th day of *April* in the year aforesaid, the said *W. K. Wait* and *S. James*, by their said attorney, came and offered themselves in their plea of plaint aforesaid; and thereupon the said *W. K. Wait* and *S. James*, by their said attorney, according to the custom of the city aforesaid, swore (*a*) in the same

Oath for 600*l.* by attorney.

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the said *F.* when he should be thereunto requested; to which grant, so made in satisfaction of the trespass aforesaid, the said *F.* then and there agreed. And the said *F.* says, that in the said court of the *Tower* aforesaid there is, and from time whereof the memory of man is not extant, there hath been, such a custom, that if any one within the jurisdiction of that court had granted to pay to any other person any debt, or any sum of money to be paid, and should not pay that sum according to that grant, he to whom that grant should be made, has had and maintained this manner of action by plaint of debt, and from time whereof the memory of man is not extant, against him who had made that grant, has been accustomed to maintain, in as ample and in the same manner and form as he would have upon any obligation made within the jurisdiction of the same court. Yet the said *R.*, although often requested, has not yet rendered the said 20*l.* to the said *F.*, but has hitherto refused and still refuses to render the same to him. Wherefore he says that he is injured and hath damage to the value of 100*s.*, and whereof he brings suit, &c."

Custom of *concessit solvere.*

The record, after stating an imparlance and the manucaption of *R.*, sets out a judgment by default for 20*l.* debt, and damages 6*s.* 8*d.* *P.* 22 *H.* 7. *Rot.* 396., *Rast. Ent.* 550 b. See process of this court pleaded to an assault, *Lawley* v. *Walwin*, *M.* 4. *E.* 4., fo. 36. pl. 18.

(*a*) *Wait* had made affidavit for 550*l.* and upwards (*suprà*, 5.).

Perj forei tach

See plea justifying words declared upon as imputing perjury to a plaintiff who issued a foreign attachment for a debt which was afterwards disproved

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court that he, the said attorney, was informed by the said *W. K. Wait* and *S. James*, that the said *John Coombe* then owed to the said *W. K. Wait* and *S. James* the sum of 600*l.* of lawful money of *Great Britain*, and the said *W. K. Wait* and *S. James* here in court, according to the custom of the city aforesaid, found pledges, (to wit) *David Morgan* and *Henry Jew*, yeomen, both of the city aforesaid, and citizens of the said city, to restore to the said *John Coombe* the said goods and chattels according to the custom of the city aforesaid, if he the said *J. Coombe*, within a year and a day then next following, came and himself falsified and disproved the debt aforesaid; and afterwards, at the same court of our said Lord the King, of the Tolzey of the city aforesaid, holden here in the Guildhall aforesaid, according to the custom of the said city, the said *Monday* the 10th day of *April* in the year aforesaid, came as well the said *R. Bruce*, by his said attorney, as the said *W. K. Wait* and *S. James*, by their said attorney, and the said *W. K. Wait* and *S. James*, according to the custom of the city aforesaid, by their attorney aforesaid, say that by reason of any thing alleged in the plea of property of

Pledges to restore.

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by the defendant. Although the plaintiff was not sworn in person, but by attorney, the justification was held to be sufficient. "Mes nota que le dit plaintiff in person ne fuit jure, eins son attorney pur luy, qui est son oath per atturney." *Lucas* v. *Cotton*, 1 *Anderson*, 12, pl. 27; *S. C. Sir F. Moore*, 79, pl. 210., and shortly reported, *Benlowes*, 40, pl. 163. But it has been held, that where the custom is to swear the debt, it is not sufficient to allege that the plaintiff swore his debt to be true, by himself, or by his attorney; for his attorney cannot swear it to be a true debt. *Pearse* v. *Calcot*, 1 *Roll. Abr.* 554. translated, 7 *Vin. Abr.* 230. I. Here, the attorney cannot be said to swear to the debt at all, the allegation being in this extraordinary form, that the plaintiffs by their attorney swear that the attorney has been informed by them. In *Leuknor* v. *Huntley*, *Cro. El.* 713., the circumstance that the debt was not sworn to by the plaintiff himself was held to be an incurable defect; and see *Hern* v. *Stubbers*, *Latch*, 208., *Hatton* v. *Isemonger*, 1 *Stra.* 641.; 17 *Edw.* 4. *c.* 2.

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Counterplea of claim.

Similiter (a).

Award of jury process.

the said claimant, he the said claimant ought not to have judgment, and a return of the goods and chattels in the said plea mentioned, being the goods and chattels attached in this cause, adjudged to him, because the said *W. K. Wait* and *S. James* say that the same goods and chattels, at the time of the attachment made, were the property of the said *John Coombe*, and not of the said claimant, and this they are ready to verify, and pray that the same may be inquired of by the country (a), and the said claimant doth the like, &c.; and thereupon at the same court of our said Lord the King at the Tolzey of the city aforesaid, held here in the Guildhall aforesaid, the said *Monday* the 10th day of *April* in the year aforesaid, according to the custom of the city, it is commanded by the same court here to the aforesaid *Richard Pointing*, officer, and one of the ministers of the court aforesaid, that he, according to the custom of the city aforesaid, cause to come at the next court of the Tolzey of the said city of *Bristol*, in the Guildhall of the said city, there to be holden on *Wednesday* the 12th day of *April* in the year aforesaid, twelve good and lawful burgesses (b) of the city aforesaid, by whom the truth of the matter will be the better known, and who are in nowise related either to the said *R. Bruce* the claimant, or to the said *W. K. Wait* and *S. James* the plaintiffs, to make a jury of the country between the said *R. Bruce* and the said *W. K. Wait* and *S. James*, to try and determine the claim aforesaid, because as well the said *R. Bruce*, the said *W. K. Wait* and *S. James*, between whom the matter is in dispute, have submitted themselves to that jury, and the same day is given by the same court here to the parties there, &c.; and at the same court of our said Lord the King of the Tolzey of the city aforesaid, held the said *Wed*

(a) *Vide post*, 20, 21. 29. (b) *Vide suprà*, 1. note (a).

nesday the 12th day of *April* in the year aforesaid, here, in the Guildhall of the city aforesaid, according to the custom of the city aforesaid, came as well the said *R. Bruce* as the said *W. K. Wait* and *S. James*, by their attorneys aforesaid; and the said *Richard Pointing*, officer, and one of the ministers of the court here, now here in court, according to the custom of the city aforesaid, came and returned upon the precept last mentioned, that he had in all things served and executed the same precept as he had been commanded, together with a panel of thirty-six honest and lawful men, burgesses (*a*) of the city aforesaid to the same precept annexed, and that every of them by themselves severally were attached by pledges, (to wit) *John Den* and *Richard Fen;* and the jury aforesaid so thereupon empanelled, none of them came, and afterwards the process being continued between the said *R. Bruce* and the said *W. K. Wait* and *S. James* of the claim aforesaid by the jury between them, being respited through the default of jurors according to the custom of the said city here, until the court of our said Lord the King of the Tolzey of the city aforesaid in the Guildhall aforesaid, according to the custom of the said city, there to be held on *Wednesday* the 12th day of *July* then next following, in the first year of the reign of our Sovereign Lady *Victoria*, by, &c., until which court the said *R. Bruce* and the said *W. K. Wait* and *S. James* had day here, in that claim. At which said court of our said Lady the Queen of the Tolzey of the city aforesaid, holden in the Guildhall aforesaid, the said *Wednesday* the 12th day of *July* last mentioned, according to the custom of the city aforesaid, before the said Sir *Charles Wetherell*, knight, then and there being judge of the said court, came as well the said *R. Bruce* as the said *W. K. Wait*

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Return of jury process.

Default of jurors.

Trial.

(*a*) *Vide supra*, 1. note (*a*).

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and *S. James*, by their attorney aforesaid, and the said jury being thereunto rightfully required, some of them, (to wit) *John Barton* (and eleven others), came and were sworn into that jury, who being so elected and sworn,

Verdict.

upon their oaths say, that the goods and chattels attached and returned, and claimed by the said *R. Bruce*, were at the time of the attachment made, the property of the defendant *John Coombe*, and that the same, or any of them, was or were not at the time of the said attachment the proper goods and chattels of the said *R. Bruce*, as the said *R. Bruce* in his claim of property aforesaid hath above supposed; therefore, on

Judgment against claimant.

the said *Wednesday* the 12th day of *July* last mentioned, it is considered by the court here that judgment be entered for the said *W. K. Wait* and *S. James*;

Misericordia.

and the said *R. Bruce* in mercy, &c. (*a*). And thereupon at the same court of our said Lady the Queen, of the Tolzey of the city aforesaid, held the said *Wednesday* the 12th day of *July* in the year last mentioned, here in the Guildhall of the city aforesaid, according to

Process of appraisement prayed and awarded.

the custom of the city aforesaid, at the petition of the said *W. K. Wait* and *S. James*, made to the said court by their said attorney, according to the custom of the city aforesaid for the whole time aforesaid in the same used, and the liberties and privileges of the same city, it was commanded by the said court here to the said *R. Pointing*, officer, and one of the ministers of the court here, that he, by good appraisers, should appraise the goods and chattels aforesaid, so that he should have at the next court of our said Lady the Queen of the Tolzey aforesaid, in the Guildhall of the city aforesaid, the appraisers aforesaid, with their appraisement; and afterwards at the next court of our said Lady the Queen, of the Tolzey of the city aforesaid, holden here in the

(*a*) *Vide infrà*, 40.

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Guildhall of the city aforesaid, according to the custom of the city aforesaid, on *Friday* the 14th day of *July* in the year last mentioned, the said *W. K. Wait* and *S. James* by their said attorney appeared, and the said *R. Pointing*, officer, and one of the ministers of the court returned upon the precept last mentioned, that he, by virtue of that precept to him in form aforesaid directed, had appraised by good appraisers, (to wit) by *Samuel Alexander* and *Samuel Alexander* the younger, of the city aforesaid, brokers, burgesses of the city aforesaid, upon their oaths, the goods, chattels aforesaid, to the value of 468*l.* 10*s.* of lawful money current in *England*; and thereupon, according to the custom of the same city, a day is given to the said *W. K. Wait* and *S. James*, by the same court, until the court of our said Lady the Queen of the Tolzey of the city aforesaid, to be holden here in the Guildhall aforesaid, according to the custom of the city aforesaid, on *Wednesday* the 26th day of *July* in the year last mentioned; to which court of our said Lady the Queen of the Tolzey of the city aforesaid, holden here in the Guildhall aforesaid, according to the custom of the city aforesaid, on the said *Wednesday* the 26th day of *July* in the year last mentioned, the said *W. K. Wait* and *S. James*, by their said attorney, came, and prayed that the said 3388 bushels of oats, being the said goods and chattels so as aforesaid attached and appraised, might be sold, and that the said *W. K. Wait* and *S. James*, out of the money arising from such sale, might have satisfaction of their debt aforesaid, by them so as aforesaid, against the said *J. Coombe*, sought and proved, as far as such money would extend; whereupon, and because that it appeared to the court here that eight days were expired after the appraisement aforesaid so as aforesaid made, therefore, according to the custom of the city aforesaid, during the whole time aforesaid in the same used, and the

Return.

Sale prayed.

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Venditioni exponas.

liberties and privileges of the same city, it was commanded by the same court to the said *R. Pointing*, officer, and one of the ministers of the court here, that he should expose to sale the goods and chattels so attached and condemned as aforesaid; and afterwards at the court of our said Lady the Queen of the Tolzey of the city aforesaid, holden here, in the Guildhall aforesaid, according to the custom of the city aforesaid, on *Monday* the 21st day of *August* in the year last mentioned, came the said *W. K. Wait* and *S. James*, by their said attorney, and the aforesaid *R. Pointing*, officer, and one of the ministers of the court now here in the same court, returned and certified upon the precept last mentioned, that he, by virtue of that precept to him in form aforesaid directed, had sold the goods and chattels therein mentioned by public auction to sundry persons for the sum of 444*l.* 19*s.* 8*d.* in the whole, of lawful money, &c., after paying the expenses of sale. And hereupon, at the same court, at the petition of the said *W. K. Wait* and *S. James*, by their said attorney made, according to the custom of the city aforesaid, from time whereof the memory of man is not to the contrary, used and approved, it was considered by the court here that the said *W. K. Wait* and *S. James* should recover against the said *J. Coombe* the said 444*l.* 19*s.* 8*d.* in part of satisfaction of their said debt of 600*l.* so as aforesaid by them sought and proved. And afterwards, at the same court here, the said *W. K. Wait* and *S. James* came in their proper persons and acknowledged to have received out of the court here the same sum of 444*l.* 19*s.* 8*d.* in part of satisfaction of their debt aforesaid.

Return.

Judgment against the defendant.

Entry of receipt of proceeds of sale in part satisfaction.

Wetherell. (L. S.)

Then follows the assignment of error.

Assignment of error.

Afterwards, to wit, on *Monday*, the 26th day of *November*, in the same term, before the justices of our Lady the Queen of the Bench at *Westminster*, comes

the said *R. Bruce*, by *Robert Medcalf* his attorney, and says that in the record and proceedings aforesaid, and also in the giving of the judgment aforesaid, there is manifest error in this, to wit, that on the 12th day of *June*, A. D. 1837, a certain writ of *certiorari* duly issued out of the court of our late Sovereign King *William* IV., before the barons of his Exchequer at *Westminster*, directed to the recorder of the borough (*a*) of the city of *Bristol* and county of the same city, and to the judge of the Tolzey court there, by which writ the said late King being willing, for certain causes, to be certified of a plaint levied in the court of the said late King before the said recorder and judge against *J. Coombe* at the suit of *W. K. Wait* and *S. James*, in an action of debt by attachment, wherein the said *R. Bruce* was claimant of certain goods and chattels attached as the goods of the said *J. Coombe*, commanded the said Recorder and Judge to send to the barons of the said late King's Court of Exchequer at *Westminster*, on the 2d day of *November* then next following the plaint aforesaid, and all things touching the same, as fully and entirely as it remained in the said late King's court before the said recorder and judge, by whatsoever names the parties might be called therein, together with the said writ of *certiorari*, that the said late King might further cause to be done thereupon what of right the said late King might see fit to be done; which writ afterwards, and before the said return day thereof, to wit, on the 12th day of *July* in the year 1837 aforesaid, was duly shewn and delivered to Sir *C. Wetherell*, knight, then and still being the recorder of the borough (*a*) of the said city of *Bristol* and judge of the said Tolzey court, to be by him allowed in due form of law (*b*); and the said

(*a*) *Vide suprà*, 1. note (*a*).

(*b*) The recorder having proceeded in the action notwithstanding the *certiorari*. By

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R. Bruce further saith, that although it appears by the record aforesaid that he, the said *R. Bruce*, joined in the issue so taken by the said *W. K. Wait* and *S. James* upon the said plea of property of him the said *R. Bruce*, and in the prayer of the said *W. K. Wait* and *S. James* that such inquiry should be made by the country as in the said record is mentioned, yet the said *R. Bruce* saith that the said entry of joinder in issue was made by and on behalf of the said *W. K. Wait* and *S. James* without the knowledge of him the said *R. Bruce*, and without any authority from him the said *R. Bruce* to make such entry for him or on his behalf; and the said *R. Bruce* further saith, that the said writ of *certiorari* was shewn and delivered to the said Sir *C. Wetherell*, so being such recorder and judge, at the opening of the said court so holden on the 12th day of *July* in the year 1837 aforesaid, and before the trial of the said issue, yet the said Sir *C. Wetherell*, so being such recorder and judge as aforesaid, then and there wholly refused to allow the said writ of *certiorari*, and proceeded to the trial of the said issue, and this the said *R. Bruce* is ready to verify; wherefore he prays that the said judgment may, for the error aforesaid, and for other errors in the record aforesaid (*a*), be reversed, annulled, and held entirely as void, and that he, the said *R. Bruce*, may be restored to all things which he has lost on occasion of the judgment aforesaid.

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21 *Jac.* 1. *c.* 23. *s.* 5. the judge or officer to whom any writ is directed, which is issued contrary to the intent and meaning of the act, is required to disallow the writ, and proceed as if it had not been issued.

(*a*) Error assigned in misjoinder of issue,—judgment reversed for misconveyance of title in writ, discovered by court, *P.* 38 *H.* 6, fo. 31, pl. 12. In *The Protector* v. *Geering, Hardres*, 85. 99., *Atkins* says, *arguendo*, "Errors are like felons and traytors; *any* man may discover them; they do *caput gerere lupinum*." And see *M.* 7 *E.* 4. fo. 16. pl. 11.; and fo. 22. pl. 25.; *Heydon's Case*, 11 *Co. Rep.* 8 *a.*; 2 *Vin. Abr.* 475.

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January 24.

Joinder in error. (*a*)

The case was partly heard in last *Hilary* term, when it was argued on behalf of the plaintiff in error by *Manning* (with whom was *Wilde*, Solicitor-General). The plaintiff has assigned errors in fact only, it not being competent to a plaintiff in error to assign error in fact and error in law also; but as the Court is bound to pronounce such judgment as the state of the record before them requires, a plaintiff in error who has assigned errors in fact only, (and, indeed, any other person as *amicus curiæ*,) may call the attention of the Court to errors in law; *Castledine* v. *Mundy*. (*b*)

Error in fact.

The disallowance of the writ of *certiorari* by the judge of the Tolzey Court renders the subsequent proceedings erroneous on three distinct grounds. First, a

(*a*) The points for argument marked in the margin of the paper books delivered by the plaintiff in error were,

1. That the writ of *certiorari* ought to have been allowed by the Recorder of *Bristol* on several grounds; first, because a proceeding by foreign attachment is not within 21 *Jac.* 1. c. 23., inasmuch as the whole tenor of the provisions of that statute is inapplicable to such a mode of proceeding; secondly, because the statute only applies to cases in which the defendant in the inferior court has been arrested or has appeared to an action or suit commenced against him; whereas *Coombe*, the defendant below, neither was arrested nor appeared; thirdly, because the joinder of issue mentioned in the second section of the statute, means such a joinder of issue as imports a consent to and an acquiescence in such issue, — it is an act done by a party accepting an issue, and not an act done by his adversary, without his concurrence, and perhaps without his knowledge.

2. That the judgment of the court below was erroneous, because no charter or custom is set out to warrant the course of proceeding pursued in the Tolzey Court. *Vide post*, 41. (*a*).

3. That it appears by the record that the attachment issued against *Coombe* without any summons having been previously issued, and without any notice given to him of the existence of any plaint, action, or suit, and without any default in him in respect of his appearance to any plaint, &c.

4. That it does not appear by the record below that the debt for which *Coombe* was sued, arose within the jurisdiction of the Tolzey Court.

(*b*) 4 *B. & Adol.* 90.; 1 *Nev. & Mann.* 635.

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proceeding by foreign attachment is not within the statute of 21 *Jac.* 1. *c.* 23., which restricts the operation of writs of *certiorari*, &c., in removing proceedings from inferior courts. (*a*) At common law proceedings by foreign attachment in an inferior court of record, were removable into one of the superior courts by *certiorari*; *Cross* v. *Smith* (*b*), where it is said by the Court, "And even in the case of a customary proceeding by foreign attachment, if a defendant cannot find bail below, he may bring a *certiorari*, and, on putting in bail above, the cause shall go on there." (*c*)

So a customary proceeding in the lord mayor's court,

(*a*) It has been doubted whether a proceeding under the custom by foreign attachment is removable into a superior court, inasmuch as the goods are in the custody of the inferior court. But independently of the above authority, it would appear to be immaterial whether the appearance of the defendant is enforced by a customary proceeding against his goods in foreign custody, or by a common-law proceeding against goods in his own custody; and it is observable, that in the case in which the objection was taken, *Bruce* v. *Wait*, 3 *Mees. & W.* 21., the goods were not stated to be in foreign custody, or to be attached in foreign hands. It has been held, that if a plea be removed into the Court of K. B., of which plea that Court has no cognizance, as formedon, &c., yet there they shall hold plea therein, as the court where it ought to have been brought should do, and shall make process by *grand cape*, *petit cape*, and otherwise, as the first court should have done; and so, if a thing before justices of peace be removed before them, *per Fineux* C. J. *Bro.* tit. *Abr. Jurisdiction*, pl. 46. So of plea in banc upon original commenced in antient demesne. *Bro.* tit. *Cause de remover Plea*, pl. 29.

(*b*) 1 *Salk.* 148.

(*c*) But see *Crosse's Case*, 1 *Roll. Rep.* 268. "A creditor of *W. A.* attaches his debt in the hands of *W. S.*, who was indebted to the said *W. A.*, and this being removed into B. R. by *certiorari*, a *procedendo* was prayed; but *Coke* C. J. said, that where the party cannot have the like remedy in B. R. as he may in *London*, upon this custom of foreign attachment, it ought to be remanded: and *Doderidge* said, that, by way of bar, we often allow such customs of *London*; as when a debt recovered there by force of foreign attachment, and afterwards the debtee of him in whose hands it was attached, brings action for it and the foreign attachment is pleaded in bar, we ought to allow it; bu upon such custom, by way

for better security; *Horton* v. *Beckman.* (*a*) So by *habeas corpus*, *Tidd's Pract.* (*b*), *Horton* v. *Beckmann* (*a*), *Keate* v. *Goldstein* (*c*); upon which latter writ, however, though the cause be removed, the plaintiff must declare *de novo*; whereas upon a *certiorari* the record is removed *cum omnibus ea tangentibus*; *Dorrington* v. *Edwin* (*d*), *Cross* v. *Smith* (*e*); and these writs may issue out of the Exchequer as well as out of either of the other superior courts. (*g*) The statute of 21 *Jac.* 1. *c.* 23. does not apply to a proceeding of this kind. For this there is an express decree of the Court of King's Bench upon the strictly analogous statute of 19 *G.* 3. *c.* 70. *s.* 4., which authorises the removal of judgment from inferior courts. The reason, as given by *Abbott* C. J., when this statute does not apply to cases of foreign attachment, is, that the preamble to that section refers only to cases in which defendant is

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original suit, we cannot do right to the party, and therefore the *procedendo* ought to be granted; and this custom has very often been pleaded in our books; and this diversity was agreed by *Coke* C. J., and a *procedendo* granted." The distinction seems to be this, that after appearance, or for the purpose of appearing, the action of debt in the inferior court may be removed by *certiorari*, notwithstanding the customary process of foreign attachment has been resorted to for the purpose of compelling an appearance; but that whilst the process of foreign attachment is in progress, and before the object has been attained, it shall not be intercepted and frustrated by a removal of the proceedings into a court which does not possess the means of enforcing appearance by process against goods, unless the goods be in the possession of the defendant, so as to be within the reach of a *distringas*, or of an ordinary attachment against goods.

(*a*) 6 *T. R.* 760.

(*b*) *Tidd*, 9th ed. 403., &c.

(*c*) 7 *Barn. & Cress.* 525., 1 *Mann. & Ryl.* 305.

(*d*) *Skinner*, 244.

(*e*) 1 *Salk.* 148.; and 2 *Ld. Raym.* 837.

(*g*) *F. N. B.* 245 A. "The King may remove that writ to any of the said courts or offices, to certify such record before him *in banco*, or in the Chancery, or before other justices where the King pleaseth to have the same certified."

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"served with process;" *Bulmer* v. *Marshall.* (*a*) Before the late statute, 1 & 2 *Vict. c.* 110., a defendant might be arrested for a debt for which he had been already sued by foreign attachment, and had put in bail, *Bromley* v. *Peck* (*b*), or had actually surrendered in discharge of that attachment; *Wood* v. *Thompson* (*c*); the ground of those decisions being that a proceeding by foreign attachment is not equivalent to an arrest, even where the same consequences are produced; so, though a *fiat* in bankruptcy is a statutory execution, yet, not being an execution on a judgment, it is not an execution within 8 *Ann. c.* 14. *s.* 1.; *Lee* v. *Lopes.* (*d*) And see *Brandling* v. *Barrington* (*e*); *Till-Adam* v. *Inhabitants of Bristol.* (*g*)

But, secondly, supposing proceedings by foreign attachment to be within the statute of *James*, it is here alleged by the plaintiff in error as part of the assignment of error in fact, and confessed by the plea in *nullo est erratum*, that the *similiter* was added by the plaintiff without the authority of the claimant. By the statute the *certiorari* must be delivered before demurrer or issue joined (*h*); for it would be unreasonable and vexatious to remove a cause from the inferior court after both parties had *agreed* to abide by the decision of that court upon the matter of law or question of fact raised by the plead-

(*a*) 5 *B. & Ald.* 821.; 1 *Dowl. & R.* 537.

(*b*) 5 *Taunt.* 852. n.

(*c*) 5 *Taunt.* 851.

(*d*) 15 *East*, 230. 232.

(*e*) 6 *Barn. & Cress.* 467.

(*g*) 4 *Nev. & Mann.* 147. 152, 153.

(*h*) Which enacts that no writ of *certiorari* to be sued out to stay or remove any action, &c., brought, commenced, or depending in any court of record within any city, &c., shall be received or allowed by the steward, judge, or officer of the court, wherein or to whom such writ shall be directed and delivered, &c., except the writ be delivered to the steward, &c., before *issue* or demurrer *joined* in the said cause, so as the said issue or demurrer be not joined within six weeks next after the *arrest* or *appearance* of the *defendant* or *defendants* in such action or suit.

ings. But the reason does not apply where the act done is not concurred in by the parties issuing the *certiorari*. It is usual in the superior courts for the party who takes issue to add the joinder in issue for his adversary; but this is not binding upon the adversary until the latter has acquiesced in it by accepting the issue. If he please he may, as a matter of course, strike out the *similiter*. It is true that, upon the motion for an attachment against the Recorder of *Bristol* in this case (*a*), the Court of Exchequer refused to grant the rule *nisi* upon this ground, being of opinion that this was mere matter of practice to be regulated by the court below; but it is submitted, that if such practice had existed, it should have been shewn by a counter affidavit upon the motion in the Exchequer, and should have been pleaded to the assignment of error here; and further, that the inferior court cannot so regulate its practice as to give itself jurisdiction where, but for such regulation, the jurisdiction would be negatived by act of parliament. If this could be done, there seems to be no reason why an inferior court might not authorise a plaintiff to entitle his plaint of a date anterior to that on which it was actually levied, and thereby elude the statute of limitations.

But, thirdly, the statute of *James* applies only to those cases in which the inferior court has jurisdiction. In *Clapham's Case* (*b*) this court awarded a *habeas corpus* to a court at *Guildford* to remove an action of debt. The Judge of the inferior court proceeded, notwithstanding the *habeas*, on the ground that issue had been joined more than six weeks after action brought. But inasmuch as it appeared that the action was brought upon an obligation not made within the vill, it was held that the proceedings subsequent to the delivery of the *habeas*

(*a*) 3 *Mees. & Welsb.* 21. (*b*) *Cro. Car.* 79.

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were void, and a *supersedeas* was granted in this court. Here, the proceedings subsequent to the delivery of the *certiorari* were void on the same ground, and also because the suit in the Tolzey Court was commenced by process of attachment without any previous default on the part of the defendant below. With respect to its not being shewn that the cause of action arose with the jurisdiction, it has been held that in an inferior court it must appear that the cause of a promise or the cause of the debt arose within the jurisdiction, and it is not sufficient that the *promise* was made there. (*a*) Upon the other point, the absence of a summons preceding the attachment, *Fisher* v. *Lane* (*b*), recognised in *M'Daniel* v. *Hughes* (*c*), is decisive. There, in *assumpsit* by an administratrix, the defendant pleaded *non assumpsit*, and gave in evidence the minutes of a proceeding by foreign attachment entered as follows: — "*Henry J'Anson* demands against *B. Fisher* 100*l.* which she unjustly detains: for that *John Fisher*, the intestate, was, in his lifetime, indebted to the said *Henry J'Anson* in debt 100*l.*, damages 92*l.* 18*s.* Pledges, &c., that the officer afterwards, on the said 17th day of *May*, 10 *G.* 3., between the hours of three and four o'clock in the afternoon, attached the 92*l.* 18*s.*, the money of *John Fisher*, the intestate, in the hands of *Lane* and others. The Court held, that inasmuch as Mrs. *Fisher* had not been summoned the judgment was erroneous, and that it furnished no defence to the party who had paid under it. That was a much stronger case than the present; for there the objection prevailed against the garnishee, who was not privy to the transactions between *Fisher*,

(*a*) See *Moravia* v. *Sloper*, *Willes*, 30.; *Trevor* v. *Wall*, 1 *T. R.* 151.; *Horton* v. *Beckman*, 6 *T. R.* 760. 764., and the cases collected, 1 *Wms. Saund.* 74 *b.*

(*b*) 3 *Wils.* 297.; and 2 *W. Bla.* 834.

(*c*) 3 *East*, 372.; and 1 *Wms. Saund.* 67 *a.*

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the plaintiff's intestate, and *J'Anson*, who sued the administratrix in the mayor's court. This latter objection entitles the plaintiff in error to ask for a reversal of the judgment on two grounds. In *Clapham's Case* (*a*) it was held, that if there was defect of jurisdiction in the inferior court, the proceedings were removable by *certiorari*, notwithstanding issue might have been joined more than six weeks after the arrest or appearance of the defendant, because the action was upon an obligation not made within the vill, and the statute "provides against the removing such actions only when the cause of such property arises within the vill." The fact that the attachment issued without a previous summons is as fatal an objection in this case as that of the obligation being made out of the vill in *Clapham's Case*. The judgment therefore is reversible for the error in fact, and that the recorder proceeded after the delivery of a *certiorari* in a case not within the statute of *James*, by reason of the defect of jurisdiction created by the irregularity of issuing the attachment without a previous summons. But, independently of the errors in fact assigned, and supposing no *certiorari* to have issued, the absence of a summons to ground the attachment is a defect which the plaintiff in error might have assigned as error in *law*; *Horton* v. *Beckmann* (*b*); but of which *Castledine* v. *Munday* (*c*) shews that the plaintiff in error is entitled to avail himself, though not assigned. [*Tindal* C. J. You cannot make your error in fact a stepping-stone for the error in law.] It is submitted that the absence of a summons is a defect in the proceedings which will support the error in fact assigned, the defendant in error and the recorder having pro-

(*a*) *Suprà*, 21. (*b*).

(*b*) *Ubi suprà*; and see *Ward* v. *Ellayn*, *Cro. Jac.* 261.; *Buchanan* v. *Rucker*, 9 *East*, 192.; *Ld. Cavan* v. *Stewart*, 1 *Stark. N. P. C.* 525.

(*c*) *Suprà*, 17.

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ceeded after the delivery of a *certiorari*, which ought to have been allowed by reason of that defect, and which will also of itself constitute error in law.

Fourthly, the statute of *James* applies only where demurrer or issue has been joined more than six weeks after the arrest or appearance of the party who is defendant in the inferior court (*a*), whereas here *Coombe*, the original defendant, never was arrested and never did appear. That objection was met in the Court of Exchequer, by holding that the claim of property put in by *Bruce* was, for the purposes of this statute, tantamount to an *appearance by the defendant*; but such a decision appears to be at variance with the judgment of Lord *Tenterden* in *Bulmer* v. *Marshall*. (*b*) Another answer given by the Court of Exchequer to this objection was, that the *certiorari* had issued irregularly in having been obtained *ex parte* as a matter of course, whereas it ought not to have issued without the leave of the Court, obtained upon pointing out some flaw in the proceedings or defect in the record. Upon that ground the Court of Exchequer discharged the rule against the Recorder of *Bristol* for an attachment for his contempt in proceeding after the delivery of the *certiorari*, with costs, although the attention of that court was called to the absence of jurisdiction in the recorder from the circumstance of there having been no summons to support the attachment, and although, supposing the *certiorari* to have issued *irregularly*, it was binding upon the inferior court until it should be quashed or superseded, or a *procedendo* should be granted; *Zink* v. *Langton* (*c*), *William* v. *Thomas* (*d*), *Jones* v. *Davies* (*e*), *Keate* v. *Goldstein*. (*g*) Whilst the

(*a*) *Antè*, 20. (*h*).
(*b*) 5 *Barn. & Ald.* 821.; 1 *Dowl. & Ryl.* 537.
(*c*) 2 *Dougl.* 749
(*d*) *Ibid.* 751. n.
(*e*) 1 *Barn. & Cress.* 143.
(*g*) 1 *Mann. & Ryl.* 305.

certiorari, however issued, remains in force, it is a contempt in the inferior court to go on, and the subsequent proceedings are erroneous, and *coram non judice*, *Cross* v. *Smith* (*a*), *Zink* v. *Langton* (*b*), *Tidd's Practice*. (*c*)

Fifthly, the record set out no charter or custom upon which this proceeding is founded; *Sherborn* v. *Bostock* (*d*), *Horton* v. *Beckman*. (*e*) No presumption can be made in favour of the proceedings of an inferior court. [*Tindal* C. J. You bring up the record as it is in the city. Do not they know their own customs? It is not like the case of a *plea* of foreign attachment. The inferior court is not bound to set out its custom.] The custom of *London* as to foreign attachment has been certified by the mouth of the recorder, 1 *Wms. Saund.* 67 (1), and all the customs of *London* have been confirmed by act of parliament. The customs of other districts are not regarded with equal favour. (*g*) [*Tindal* C. J. Are you aware

(*a*) 1 *Salk.* 148.; 12 *Mod.* 643., and 2 *Ld. Raym.* 836.

(*b*) 2 *Dougl.* 748.

(*c*) 9th ed. 404.

(*d*) *Fitzgibbon*, 51.

(*e*) 6 *T. R.* 760.

(*g*) "If in bar of an action a foreign attachment is pleaded," that the custom is, that if any man brings his action against another for any debt, and upon a return made, that he *non est inventus*, and *quod nihil unde* &c., and thereupon surmises, that any other is indebted to the defendant in such a sum, and thereupon to pray process to attach the sum in his hands, and to defend, *ita quod*, the defendant appears to answer the plaintiff, and the serjeant returns that he hath attached him to defend the sum in his hands, and the defendant does not appear at four courts after, &c., that judgment shall be to recover it in his hands, &c., this is no good custom, without a surmise that the stranger, (*i. e.* the garnishee,) who is indebted to the plaintiff, (*i. e.* the defendant in the attachment,) is *within the jurisdiction of the court*, and the return of the serjeant is not sufficient that he hath attached him to defend it in his hands; for perhaps the serjeant intends that he may attach the debt in his hands, though he be not within the jurisdiction of the Court; and his return shall not bind the party, without an actual surmise thereof by the party himself; *Halse* v. *Walker*, *T.* 11 *Car.* 1. K. B., adjudged upon a demurrer, where a foreign attachment in *Exeter* was pleaded, which was all one with the custom of *London*, and all customs *then* confirmed by

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that in *Harington* v. *Macmorris* (*a*), it was held that in a foreign attachment it is not necessary that the debt should arise, or that the defendant should reside within the jurisdiction, or be actually summoned?] The case itself does not warrant that which is now read from the marginal note.

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R. V. Richards [with whom was *Whitmore*]. The record states that *Wait* and *James* sought process of foreign attachment of this same court to be made thereupon against the said *J. Coombe*, according to the custom of the said city *from time aforesaid used and approved of.* It must, therefore, be assumed, that what has been done has been done according to a custom existing from time *immemorial;* and unless the other side is prepared to shew that no such custom can legally exist, the judgment will be affirmed. The object of proceeding by foreign attachment is, not to obtain the payment of the debt, but to get a gage, that the party will appear. If the defendant puts in bail within a year and a day, the goods are released. *Harington* v. *Macmorris* is an authority for the defendants in error. Although in *London* the custom is to obtain a summons, it is not necessary to serve it or to shew (*b*) that the defendant was within the jurisdiction. Putting the summons on the record, therefore, is a mere needless form. In *Harington* v. *Macmorris* it was held, that in a foreign attachment it is not necessary that the debt should arise within the jurisdiction, or that the defendant in the inferior court should reside within the jurisdiction, or that he

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parliament in the time of Queen *Elizabeth,*" 1 *Roll. Abr.* 554.; translated, 7 *Vin. Abr.* 232., (K) 3. And see *Traub* v. *Schmidt, Mann. N. P. Digest,* 351.; *Ballard* v. *Bennet,* 2 *Burr.* 775.; *Rex* v. *Chamberlains of Worcester,* 2 *Ld. Ken.* 469.

(*a*) 5 *Taunt.* 228.; 1 *Marshall,* 33.

(*b*) *Sed vide Bowser* v. *Colins, post,* 39. (*b*); 1 *Wms. Saund.* 67. (1.)

should be actually summoned. In the argument of that case it was justly observed by *Lens* Serjeant, that process of foreign attachment is resorted to most frequently in the case where the party is not resident in *London*, and a *nihil* was returned upon the summons; and that to require actual service of the summons, therefore, would overthrow the whole system of foreign attachments. So in *Banks* v. *Self* (*a*), it was held that in a plea of foreign attachment it is not necessary to aver the custom, that the plaintiff below shall swear to the debt, or that, in fact, he did swear to it, or that the defendant below was indebted to the plaintiff below within the jurisdiction.

If it be unnecessary to shew an actual summons, it cannot be necessary to shew a summons at all. For all purposes attachment is the first proceeding. In *Banks* v. *Self* it was held to be unnecessary, in pleading a foreign attachment, to aver that the original defendant was indebted to the original plaintiff within the jurisdiction. According to the cases, a garnishee has no right to object that there is no debt between the plaintiff below and the defendant below. In this case the only question which *Bruce* the garnishee could properly raise was, whether the goods attached are the goods of *Coombe*. *Thompson* v. *Davenport* (*b*). One of the errors assigned in that case upon the judgment given in the Passage Court of *Liverpool* was, that it appears by the record that there issued out of the said borough court against *John Thompson* a precept to attach the body of the said *John Thompson* before such time as any writ or precept or summons, or other process, had been issued against the said *John Thompson* in the plea aforesaid. The judgment was affirmed upon another point, but it could not have been

(*a*) 5 *Taunt.* 234. n.
(*b*) 4 *Mann. & Ryl.* 110.; reported also, but not upon this point, 9 *Barn. & Cress.* 78.

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affirmed at all, if the Court had considered that the want of a summons made the proceedings erroneous. The marginal note is, "*Semble*, that upon error from an inferior court notice cannot be taken of an irregularity in bringing the party into court by attachment without a previous summons." (*a*) Several other cases lead to the same conclusion, — that in ordinary cases in inferior courts the proceeding must be by summons, not so where the extraordinary process of foreign attachment is resorted to. The Court will not hold a summons to be part of the custom. In *M'Daniel* v. *Hughes* (*b*) the Court held that a garnishee against whom a recovery is had in the mayor's court in foreign attachment, after a summons to the defendant and *nihil* returned, may protect himself by giving such proceedings in evidence upon *non assumpsit* (*c*) in an action to recover the same debt brought by the defendant below, *without proving the debt of the plaintiff below* who attached the money in his hands; although by the course of proceedings in the mayor's court, bail not having been put in, the plaintiff below was not obliged to prove the debt to entitle himself to recover against the garnishee. This goes a great way to shew that these are mere matters of form. Lord *Ellenborough* in giving judgment in *M'Daniel* v. *Hughes* remarked strongly upon *Fisher* v. *Lane*. That case is more correctly reported in *W. Blackstone*, from which it appears that the ground of the demurrer was that the facts did not bring the case

(*a*) But to that marginal note there is the following reference: *Vide tamen Prat* v. *Dixon*, *Cro. Jac.* 108.; *Ward* v. *Ellayn*, *ibid.* 261.; *Gwinne* v. *Poole*, 2 *Lutw.* 935. 1560.; *Moravia* v. *Sloper*, *Willes*, 30.; *Williams* v. *Lord Bagot*, 5 *D. & R.* 719., 3 *B. & C.* 772. In error from one of the superior courts, informality in *mesne* process is not assignable for error, but informality in the first process, or the absence of the first process (want of an original writ), may be assigned for error.

(*b*) 3 *East*, 367.

(*c*) *i. e.* before the new rules of pleading, *Hil. T.* 4 *W.* 4.

within the custom, *as it was alleged.* The demurrer in *Ward* v. *Ellayn* (*a*), and in other cases which have been referred to for the purpose of shewing that an attachment cannot issue without a previous summons, applied to sheriffs' courts, where there is no custom. These cases, therefore, have no application here, where it is expressly alleged that the attachment issued *according to the custom.* The case of *Moravia* v. *Sloper* (*b*) may be set against *Harington* v. *Macmorris* and *Thompson* v. *Davenport.* It is not necessary that the defendant should be within the jurisdiction; but it is necessary that the debt or goods attached should be there. The proceedings would clearly be good, if the summons had issued, and had been returned *non est inventus et nihil habet,* and there is no reason why an attachment should be preceded by a summons. If the garnishee were at liberty to come in and contest the truth of the return made to the summons, it might be required that the summons should be stated, but as he clearly cannot do this, there is no reason why the form should be preserved. *Williams* v. *Lord Bagot* (*c*) does not apply. There was no decision on the point. The judgment proceeded on the ground that the summons and attachment issued at the same time. There, too, the plaintiff, by issuing the summons, admitted that such a proceeding was necessary. The custom is one from which no inconvenience can arise, the only object being to bring the defendant into court. It is a proceeding in the nature of a *distringas,* and amounts to nothing more than distraining *Coombe* by his debt or goods for the purpose of compelling him to appear.

The adding of the *similiter* by the defendants in error is a mere matter of practice, and is according to the practice; but supposing that there was any irre-

(*a*) *Cro. Jac.* 261.
(*b*) *Willes.* 30.; *antè,* 28. (*a*).
(*c*) 3 *Barn. & Cress.* 772.; 5 *Dowl. & Ryl.* 719.

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gularity in the manner in which the *similiter* was added, that irregularity would be waived by the appearance of the claimant by himself or his attorney. The rule, as it is laid down in *Stephen on Pleading* (*a*), is, that where is no option as to accepting an issue — either party may add the *similiter*. The rule is laid down in the same manner in *Archbold's Practice* by *Chitty*. The adding of the *similiter* is a mere matter of practice, and a court of error cannot judge of it; *Cherry* v. *Powell*. (*b*)

Then it is said that the *certiorari* having been awarded it ought to have been obeyed, and that through its not being obeyed the subsequent proceedings are void. That objection has been already disposed of in the Court of Exchequer upon the application for an attachment against Sir *Charles Wetherell* for his supposed contempt in not obeying the writ. If the proceedings upon the foreign attachment were to be removed into this Court, how could this Court try the question of garnishment, and how could they in the mean time hold the goods?

The claim of the goods was equivalent to an *appearance* on the part of the claimant; *Bruce*, therefore, was too late with his *certiorari*, if this Court agrees with the Exchequer that the putting in of a claim satisfies the words of the statute. In *Cross* v. *Smith* (*c*) Lord *Holt* says expressly, that in the case of an exempt jurisdiction, nobody can have a *certiorari* but the defendant. The question is, whether the garnishee can bring error as well as the defendant below.

It is also objected that the alleged debt did not arise within the jurisdiction. The answer is, that where the proceeding is by *concessit solvere* (*d*), it is never averred that the consideration arose within the jurisdiction. In the *Welsh* courts, when they proceeded upon the form of

(*a*) 3d ed. p. 237.
(*b*) 1 *Dowl. & R.* 50.
(*c*) 2 *Ld. Raym.* 837.
(*d*) *Vide antè*, 6. (*a*); *post*, 32. (*a*).

action, it was not necessary. [*Tindal* C. J. The *Welsh* courts and the Palatinate courts were courts of superior jurisdiction, but *Bristol* has no such courts. Writs were issued out of the *Welsh* courts; 1 *Wms. Saunders*, 73. *Maule* J. The Court of Great Session in *Wales* had jurisdiction in transitory actions wherever the cause of action arose.] The allegation is a mere form; and as it is countenanced by immemorial usage, there appears to be no reason why the same form should not be good in the court of *Bristol*. [*Maule* J. The words are "there due." The point raised on the part of the plaintiff in error is, that the words "there due" are not sufficient.]

The objection that no charter or custom is set out, was disposed of last term. (*a*)

Manning, Serjt. in reply. It is clear law that in inferior courts the cause of action must be shewn to have arisen within the jurisdiction. In *Trevor* v. *Wall* (*b*) it was held, that it was not sufficient to allege that the defendant promised within the jurisdiction unless the consideration arose within the jurisdiction. The consideration laid in that case was money had and received to the plaintiff's use; and because it was not alleged that the money was received within the jurisdiction, the Court reversed the judgment obtained upon a verdict for the plaintiff. Here the debt being claimed as due upon a contract, not under such a consideration, must have existed, and it should have appeared that that consideration arose within the jurisdiction. Consistently with the allegation the money may have been received in *Ireland*, where *Coombe* resided; and in all probability, if the debt had any existence, the money was received in that country. [*Maule* J. In *Trevor* v. *Wall* the

(*a*) *Antè*, 25.

(*b*) 1 *T. R.* 151.; and see *Thom* v. *Chinnock*, *post*.

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action was *assumpsit*, in which the consideration was necessarily set out. *Tindal* C. J. Speaking of *concessit solvere*, Serjt. *Williams* says, "This is an action of debt upon simple contract."]

In *Storey* v. *Atkins* it was held that there was no more occasion to set out the custom at large in an *assumpsit solvere* (as that was) than in the *concessit solvere*, in which case it has been adjudged the custom need not be set out at large, but declaring *secundum consuetudinem*, &c. was sufficient. But here the language of the record is, "That whereas the said *John*, on the 2d day of *January* then last past, here at the city of *Bristol*, in the ward of *All Saints*, then within the jurisdiction of this Court, granted to pay to them, the said *W. K. Wait* and *S. James*, 1100*l.* of, &c., for divers sums of money from the said *John* to the said *W. K. Wait* and *S. James* before that time then due and then being unpaid, to be paid to the said *W. K. Wait* and *S. James* when the said *J. Coombe* should be thereunto afterwards requested. Yet," &c. No allusion is made to any custom which should warrant this general mode of declaring without shewing any specialty, or alleging any consideration. It appears also from the case in *Brooke's Abridgment*, referred to in that note by Mr. Serjt. *Williams* (*a*), that long since the time of legal

(*a*) *Bro. London*, 15. The case referred to by *Brooke* is in *T.* 38 *H.* 6. fo. 29. pl. 12., not, (as stated 1 *Wms. Saund.* 68. (2)), in 39 *H.* 6. 29. In that case, it was said "that the *concessit solvere* shall state (*duist rehercer*) for certain merchandize, goods and chattels sold, without stating in special, still it must say, for merchandize, *in bonis et catallis, sibi primo venditis, concessit solvere*, otherwise it is bad (*ou auterment ne vault*), *quod nota.*" It was afterwards admitted that, except upon the *concessit solvere*, no action could have been maintained, "for these goods were sold and bargained in *Flanders* and other countries, and because we could have no action against him within this land, we made a reckoning with him, and, for all things between us, he *concessit solvere* the sum; upon which we can *have no remedy except in Lon-*

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memory it was part of the custom, now supposed to be commenced, that the consideration of the *concessit solvere* should appear. [*Maule* J. The cases cited shew that a custom would support such a general form of declaring.(*a*) Then the record says, that it is according to the custom — the parties, "declaring according to the custom," say so. It is stated twice. Your argument goes to prove that the declaration must shew a custom. That has never been done, either in *London* or in *Bristol*: I never saw a declaration with it. Mr. Serjt. *Williams* is quite correct in what he states to be the form.]

Mr. Serjt. *Williams* cites a case in which it was agreed for law that in debt in *London* upon a *concessit solvere* by the custom, the declaration shall be that for merchandise to him before sold he granted to pay 10*l.*, so that the merchandise must be mentioned. Here the declaration stops short of what Mr. Serjt. *Williams* requires. The *concessit solvere* may here have been for goods sold, or for any thing else. [*Maule* J. That may have been to shew that it was a mercantile debt. I observe that, in the assignment of errors, the allegation is, "Which writ afterwards, and before the said return day thereof, to wit, on the 12th day of *July*, in the year 1837, of, &c., was duly shown and delivered to the recorder;" so that the 12th day of *July* being laid under a *videlicet* and immaterial, there is nothing to fix the term of the delivery of the writ except that it

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don." It would therefore appear, that by the privilege of *London*, (and perhaps of some other towns,) an action lay upon an express promise to pay the balance of an account, although the items arose abroad, even at a time when the courts of common law had not yet given themselves jurisdiction over contracts made out of the realm, by the fiction of supposing them to have been made in the parish of *St. Mary le Bow*, in the ward of *Cheap*.

(*a*) *Vide post*, 41 (*a*).

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was before the return day, whereas the statute (*a*) requires that the writ shall be delivered before the jury have appeared and one of them is sworn.] It is afterwards alleged that the said writ of *certiorari* was shewn and delivered to the said Sir *Charles Wetherell*, so being such recorder and judge, &c., of and at the opening of the court so held, on the 12th day of *July*, in the year 1837, at and before the trial of the issues. [*Maule* J. The question is, whether that is sufficient. The proper time is before the swearing of the jury. Here it is stated to be at the opening of the court, and before the trial. That is rather an argumentative denial.]

Not only does the record omit to state what the custom was, but it does not state that the custom was immemorial. The court is alleged to be held according to immemorial custom, and the process is said to have issued according to the custom of the said city. But it does not appear that the custom under which the attachment issued is the same custom under which the court was held, or that the custom under which the process issued was immemorial. [*Maule* J. Is not a custom sufficiently observed?] It is submitted that it is not. The custom relied upon in *Bristol* may have been, as in the Ecclesiastical Court, a custom of forty years.

But the most important error is the absence of a summons to support the attachment. The rule of law is, that it must appear upon the face of the record, and more especially upon the record of an inferior court, that the party has been actually summoned, or that something which can be treated as an equivalent has taken place. It has been argued that the summons is a mere form; and to prove that it is so, it has been alleged that the issuing of the summons, and the returns of *non est inventus et nihil habet* are allegations which,

(*a*) 43 *Eliz. c.* 5.; and see *Rex* v. *North*, 1 *Salk.* 144.

if made, could not have been traversed. This is not so. If a summons actually issued, and the officer, knowing that the defendant was within the jurisdiction, or that he had a residence at which the summons might be left, returned *non est inventus et nihil habet*, an action would lie against him for a false return; and the defendant would have a similar remedy against the judge of the inferior court who should return a record in which it was stated that these proceedings had occurred, if he knew that they had not occurred. And in this very case an intimation to such an effect was given, which may probably account for the state of the record, which is so returned as to agree with the actual fact in this respect. [*Maule* J. The difficulty here is this — can the garnishee take advantage of it?] A garnishee, and even the claimant in the present case, is brought in against his will, under the coercion of the seizure of his goods. He is a stranger to the proceedings between the plaintiff and the defendant, and is not estopped from requiring that the proceedings by which valuable property is to be taken out of his hands are regular.

Reference has been made to *Harington* v. *Macmorris* and *Banks* v. *Self*. But there is nothing in *Harington* v. *Macmorris* to justify the marginal note upon which so much reliance is placed on the other side. In that case the Court decided nothing upon this point. They "postponed the consideration of it;" and though the inclination of the Court was, that it is not necessary for the garnishee, when sued by his original creditor, to shew that the inferior court had jurisdiction, it would not follow that the proceedings in the inferior court were not erroneous. The opinion to which the Court inclined in *Harington* v. *Macmorris* was founded upon *Banks* v. *Self*, in which case one of the questions was, whether it was necessary, *in a plea of foreign attachment*, to aver

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that the defendant below was indebted to the plaintiff below within the jurisdiction of the inferior court. The Court held that it was not, because the uniform course of pleading had been to omit such an averment. The case relied upon by *Shepherd* Serjt., for the defendant, was that of *Self* v. *Kennicot* (*a*), in which the Court said, "There is a great difference where a man is plaintiff in an action, and the defendant here (the garnishee), who is a third person and no ways privy, and could not allege that he who is plaintiff here was a defendant below." [*Maule* J. Could *Bruce* have raised the point in the court below?] It is not necessary in the inferior court to plead that the debt arose out of the jurisdiction. (*b*) The Court is bound to take notice of the omission. Suppose *Coombe* had brought a writ of error, the judgment clearly must have been reversed. Then it cannot be good as against one, and bad as against another. Upon the same record the judgment could not have been reversed as to one, and affirmed as to the other. [*Maule* J. It comes to this, that a man cannot be attached by his goods till he has been summoned.]

The plaintiff in error is entitled to take advantage of this defect. [*Maule* J. Can he take advantage of it in this stage? The original defendant could not, I apprehend, take advantage of it against the garnishee. The garnishee might say, "I paid it under a foreign attachment," and it would be no answer to that to say, that was in a suit which, if I had come, I could have successfully defended.]

Richards referred to 2 *Bac. Abr.* Error (B), where it is said, "If a judgment be given against *B.* and the money of *C.* is attached by force of a foreign attachment

(*a*) 2 *Show.* 506. (*b*) 1 *Wms. Saund.* 74 *a.* (1).

in *London*, *C.* shall not have a writ of error, because he comes in by garnishment by the custom, and is not party or privy." The same will be found in 9 *Vin. Abr.* 494. Error (K), pl. 10.

Manning, Serjt. That cannot be doubted; and it amounts to no more than this, *A.* recovers judgment in an action in this Court against *B.* Finding that *C.* is indebted to *B.*, *A.* brings an action in the mayor's court against *B. upon the judgment.* If *B.* do not appear to the summons in the action on the judgment, *A.* attaches the debt due from *C.* to *B.* All that this case shews is, that *C.* cannot bring error upon the *first* record, in C. P., to which he is a stranger. It says nothing as to the right of the garnishee or of the defendant below to bring error upon the record in the mayor's court. But supposing the objection to be good, and that *Bruce* has no right to bring error upon this judgment, that would be merely a ground for an application to the Lord Chancellor for a *supersedeas* to the writ of error *quia improvidè emanavit*, or perhaps this Court, in which the writ of error is returnable, would have power to quash the writ upon motion. That, however, would be a substantive application. All that the Court can look to under the issue in law raised by the plea *in nullo est erratum* is, whether errors exist in the record or no. [*Maule* J. to *Richards.* How do you deal with *Fisher* v. *Lane*? (*a*) In *Wilson's Report*, it goes to the extent contended for by my Brother *Manning.*— *Richards.* That report differs from the case as reported in 2 *Blackst.*, where it appears that the decision proceeded on the ground that the custom, *as alleged*, had not been pursued.] There is no inconsistency in the two reports. The report in *Wilson* states that to attach without a previous summons is contrary to justice, while in *Black-*

(*a*) 3 *Wilson*, 297.

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stone it is said with equal truth that such a course is not warranted by the custom. [*Maule* J. The statement in *Blackstone* is not inconsistent with the report in *Wilson*. Then if in that case Mrs. *Fisher*, the defendant below, might take advantage of the omission when suing the garnishee, *à fortiori* may the garnishee here avail himself of it.]

TINDAL C. J. This is a proceeding by foreign attachment, brought before us by the garnishee in a suit in the Tolzey Court at *Bristol*, between *Wait* and *James*, plaintiffs, and *J. Coombe*, defendant. The proceedings in the court below are set out at length in the transcript of the record, and it appears that *Wait* and *James* affirmed their plaint against *Coombe* in a plea of debt upon a *concessit solvere* on demand for 1100*l.*, and that having made out by affidavit for 550*l.*, they sought process by foreign attachment to be made against *Coombe*, according to the custom of the city of *Bristol*. It is not alleged that any summons was awarded or issued, or that any return was made of *non est inventus* or *nihil habet*. The record goes on to state that thereupon, at the request of *Wait* and *James*, according to the custom of the city, the court commanded their officers to attach *Coombe* by his goods and chattels, so that he should be at the next court after the attachment in the Guildhall of the same city, to answer *Wait* and *James*. To this the officer returned and certified to the court, that by virtue of the precept he had attached *Coombe* by certain oats, being the proper goods and chattels of *Coombe*, the owner. The next statement is, that *Robert Bruce* the plaintiff in error, came and claimed property in the goods. A plea of property is then put in, to which there is a counterplea, traversing the allegation in the plea, that the oats belonged to the claimant. Issue being joined upon this traverse a verdict is found, negativing the allegation of property in the claimant

Bruce; whereupon judgment is given, as against *Bruce*, that judgment be entered against him, and that he be amerced; and after a sale of the oats judgment is given for *Wait* and *James*, to recover the proceeds of the oats in part satisfaction of their debt.

Two matters are alleged as errors in fact. It is, however, unnecessary to consider whether these matters are error or not, because it appears to me, upon the authority of *Fisher, administratrix*, v. *Lane* (*a*), that there is error in law apparent on the face of the record. In *Fisher* v. *Lane* the objection was, that there was no statement of any summons, and no return of *nihil* by the officer, whereby to justify the proceeding by former attachment.

The earliest case to be found upon the subject is in the Year-book, 22 *E.* 4. 30.(*b*), cited in *Comyns's Digest*, *Attachment* (A.), where it is said, that "by the custom of *London*, if a plaint be entered in the court of the mayor or sheriff against *A.*, and the process be returned *nihil*, and thereupon the plaintiff suggests that another person within London is indebted to *A.*, the debtor shall be warned, and if he does not deny himself to be indebted to *A.*, the debt shall be attached in his hands." (*c*) And citing the same Year-book, it is said, the "process issued by summons directed to the serjeant-at-mace *to summon the defendant*, who makes return that the defendant *nihil habet per quod summoneri potest*. Then,

(*a*) 3 *Wilson*, 297.

(*b*) *Bowser* v. *Colins*, *M.* 22 *E.* 4. fo. 30. That was an action of debt on bond, to which the defendant pleaded the custom, and an attachment under it. The plaintiff replied *nul tiel custom*; *et alii e contra*. A certificate issued to the mayor and commonalty of *London*, to certify their custom. The recorder certified a custom, varying from that pleaded; and the discussion, which lasted several days, turned upon the validity of the judgment in the mayor's court, the custom, as certified by the recorder, not having been pursued.

(*c*) This certificate of *Starkey*, recorder, is stated more correctly in 1 *Roll. Abr.* 554.; 7 *Vin. Abr.* 232. pl. 4.; 1 *Wms. Saund.* 67.

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upon a suggestion that the said *A.* is indebted to the defendant, a precept goes to the serjeant to attach the money in the hands of *A.*" (*a*) *Fisher, administratrix*, v. *Lane*, reported in *Wilson* and in *W. Blackst.*, was an action brought by Mrs. *Fisher* for a debt due to the intestate for goods sold and delivered. The defendant pleaded *non assumpsit*, and gave in evidence a payment to one *J'Anson*, under a judgment in a foreign attachment. But it did not appear from the evidence that Mrs. *Fisher* had ever been summoned to appear in the city court, or that she had any notice of the proceeding upon the foreign attachment; and it was laid down by the court broadly, that if any custom to proceed in this manner existed, such custom would be unreasonable and void. *De Grey* C. J. says, "The customs of particular cities may deviate from the course of the common law, but a custom contrary to the first principles of justice can never be good; so this custom, not to summon or give notice to a defendant in a suit commenced against him, is contrary to the first principles of justice, and (in my opinion, as at present advised) cannot be good." If proceedings in foreign attachments are *void* in fact, where it appears from the evidence that no summons has been issued, they must equally be *erroneous* where those proceedings are set out on the record.

A doubt has been suggested as to the right of *Bruce* to take advantage of the want of a summons. But he is no stranger to the record, for there is judgment against him before the collateral judgment against *Coombe*. Without saying any thing as to whether the writ of error was brought too late, it is sufficient to say that *Bruce* is not a stranger to the record, there being a judgment against him. He is therefore entitled to bring error; and on the ground of the want of summons, I am of opinion that the judgment ought to be reversed.

(*a*) *Com. Dig. Attachment*, (A,) citing *North* v. *Winskell*, 2 *Lutw.* 977. 981. 985.

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BOSANQUET J. I also am of opinion that it is error that a foreign attachment issued without any summons to the defendant to give him notice; and for the reasons stated by the Chief Justice, and in *Fisher* v. *Lane*, I think the judgment ought to be reversed. It appears to me that proceedings by foreign attachment commenced without any summons are contrary to law, and cannot be supported.

ERSKINE J. I am of the same opinion. The want of a summons and a return is shewn by the cases to be error, of which the garnishee may avail himself. For it appears by those cases, that if *Coombe* had brought an action against *Bruce*, *Bruce* could not have justified the giving up of the goods.

MAULE J. I am of opinion that this judgment must be reversed for want of a summons. *Fisher* v. *Lane* is directly in point. There is no such discrepancy between the two reports as has been suggested. Nor is *Wilson* likely to have mistaken the point, as the case was twice argued, and this point is distinctly mentioned in three places in the report. *Blackstone's* report is to the same effect, and shews that the point of want of summons was relied on. The decision in *Fisher* v. *Lane* is quite conformable to justice.

Judgment reversed. (*a*)

(*a*) And see *M'Grath* v. *Hardy*, 6 *Dowl. P. C.* 749.

On a writ of false judgment in a court of ancient demesne, the assignments of error were answered, by shewing that the proceedings were according to the custom of the manor. *M.* 11 *E.* 3. *MS. Inner Temple Library*, p. 60. of translation. And see *Barnard's Case*, 1 *Ventr.* 72., *Lomax* v. *Armorer*, 2 *Lev.* 123.

The proceeding by foreign attachment is used in *London*, *Bristol*, *Liverpool*, and *Chester*. In *Oxford*, *Exeter*, and other places, though it may still be resorted to, the practice has fallen into disuse.

The following is the old form of execution upon a "judgment of goods" after an attachment, in the court of the mayor and bailiffs of *Oxford* : —

" Preceptum est servienti ad

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clavam predictorum ballivorum, quod omnia bona et catalla *Thome B.* (the defendant) in manibus et custodia *Johannis Lydall* (the garnishee), attachiata ad sectam *Henrici Bowsworth* (the plaintiff) existentia, et ad valenciam xxv. librarum, legitime appreciata, in execucionem capiantur, et ea omnia et singula prefato *Henrico B.* per consideracionem curie predicte in execucionem deliberari facias, — tenenda eidem *Henrico* secundum tenorem et effectum judicii predicti, et secundum consuetudinem civitatis predicte, &c."

In *Scotland* all judges ordinary, superior and inferior, may grant "letters of arrestment" for arresting goods or debts in the hands of any party *haver* (Germanicè, *Inhaber*) thereof, at the instance of the creditor of him to whom the debts or goods belong: *Stair, Inst.* Book iii. *Tit.* 1. § 24. As to Saisies-arrêts in *France*, see *Code de Procédure Civile*, No. 557., &c.

May 8.

HALL *v.* BAINBRIDGE.

Covenant cannot be maintained against the chairman of the board of directors of a joint stock company, upon a deed under the seal of a former chairman of the company, though sealed by him for and on behalf of the company.

COVENANT. The declaration stated that the plaintiff complained of the defendant, chairman of the Board of Directors of the *British* and *American* Steam Navigation company, who had been summoned to answer the plaintiff in an action of covenant by virtue of a writ issued on the 3d of *April* 1839. The declaration then set out an agreement, dated the 26th of *November* 1836, made between the plaintiff of the one part, and the said company of the other part, "one part of which said agreement, sealed with the seal of one *Isaac Solly*, for and on behalf of the said *British* and *American* Steam Navigation Company, he, the said *Isaac Solly*, for the time being, acting as chairman of the said directors of the said company, the plaintiff now brings into Court," &c. The declaration proceeded to assign two breaches of the agreement. The defendant pleaded that the agreement was not the deed of the company, and three other pleas to the breaches assigned. To two of the latter pleas there was a demurrer and joinder.

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Shee, Serjt. appeared in support of the demurrer.

Martin for the defendant took an objection to the declaration, that it disclosed no contract obligatory on the defendant. It may be assumed that at the time the writ issued, the defendant filled the office of chairman; but it nowhere appears throughout the declaration that he was a member of the company: the agreement declared on is stated to have been sealed with the seal of one *Isaac Solly*, and the covenants set out are alleged to have been entered into by the company.

TINDAL C. J. Why is the defendant to be bound by the seal of *Solly*?

Shee, Serjt. The declaration states that *Solly* sealed the agreement for and on behalf of the company, he at that time acting as its chairman. It ought, therefore, to be presumed that he had power to bind the defendant. [*Tindal* C. J. One partner cannot bind another partner by deed.] The defendant does not deny that it is his deed. [*Tindal* C. J. He need not do so.] He merely pleads that it is not the deed of the company. It is to be assumed that *Solly* contracted for the company, and that he was authorised to do so by deed, if that were necessary. It further appears from the declaration, that the defendant was chairman of the company at the time of the breach complained of.

TINDAL C. J. The company might get a party to be a director who was not a partner; so a chairman need not be a member of the company. The covenant of *Solly* might possibly form the ground of an action of *assumpsit* by the plaintiff; but upon that point I give no opinion.

Judgment for defendant. (*a*)

(*a*) See *Berkeley* v. *Hardy*, 5 *B. & C.* 355.; 8 *D. & R.* 102.

May 8. BARKER *v.* STUBBS.

In an action by a tradesman for goods sold, his son is a competent witness for him, if, as between father and son, the son has no interest in the trade, although the trade be carried on in their joint names, and although in a bill of parcels, written by the son, and delivered with the goods, the defendant be made debtor to the father and son jointly.

ASSUMPSIT for goods sold and delivered. The defendant pleaded *non assumpsit* and other pleas. The plaintiff was a printseller, and the action was brought to recover the price of various prints purchased of him by the defendant. At the trial in *London* during the sittings in the present term, before *Maule* J., the plaintiff's son was called as a witness. Upon his examination on the *voir dire*, by *Bompas*, Serjt. for the defendant, the son stated that the business had been carried on in the names of his father and himself at the time of the transaction with the defendant; and that during that period the bills of parcels were made out in their joint names; but he said he never was a partner with his father, or had a share in the profits or any interest in the business. He added, that his father made him presents, and that he might have money when he wanted it. One of the bills of parcels for part of the goods supplied to the defendant had been made out by the son, and was headed, "Dr. to *James Barker* and Son." *Bompas*, Serjt. objected to the admissibility of the son as a witness, on the ground that he was a partner with his father, the contract having been made with both; and also that he ought to have been joined as a plaintiff in the action. (*a*) The learned Judge over-ruled both objections, and the son was sworn and gave his evidence. The jury having found their verdict for the plaintiff,

(*a*) The non-joinder of a co-promisee with the plaintiff would appear to be a fatal objection under the plea of non assumpsit, even since the new rules.

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Bompas, Serjt. now moved for a rule to shew cause why the verdict should not be set aside and a new trial had, on the ground that the evidence of the son was improperly received. He contended that the son having held himself out to the world as a partner was liable to the debts of the partnership, and had a direct interest in the amount sought to be recovered, which would tend to discharge him from such a liability. For, supposing the firm to be insolvent, he might be called upon to pay all the debts himself, if sufficient assets of the partnership could not be collected. [*Tindal* C. J. *Primâ facie* he would be liable to the debts, but he might shew the truth.] Also it may be doubted whether he would not be liable to the costs of the action. Undoubtedly, in *Parsons* v. *Crosby* (*a*), the plaintiff's son, who had allowed his name to be held out to the world as a partner, but who denied he had any interest in the business, was called as a witness, and was admitted by Lord *Ellenborough*; but the question is, whether the son in the present case had not an interest in the payment of the partnership debts which rendered him interested in the receipt of the debts due to the firm. There can be no doubt he might recover the latter, for the contracts were made with him as well as with the father.

TINDAL C. J. Might not the defendant, if the son had been joined in the action, have shewn that he was not in fact a partner? *Glossop* v. *Colman* (*b*) is also in point. There Lord *Ellenborough* ruled that a father who held out to the world that his son was his partner, and who made out bills and signed receipts in their joint names, was not precluded, in an action brought in his own name from shewing that his son was not a partner.

(*a*) 5 *Esp. N. P. C.* 199. (*b*) 1 *Stark. N. P. C.* 25.

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Per Curiam (TINDAL C. J. BOSANQUET, COLTMAN, and ERSKINE, Js.).

Rule refused.

May 12.

CURTIS *v.* RICKARDS.

The production by a plaintiff of an "I O U" signed by the defendant, but not addressed, is *primâ facie* evidence that it was given to the plaintiff by the defendant; and if the latter wishes to rebut the inference arising from its production by the plaintiff, he should shew that it had been in the hands of some other party.

ASSUMPSIT for money lent, money had and received, and on an account stated. Plea, *non assumpsit*. At the trial before *Maule* J., at the *Middlesex* sittings during the present term, the plaintiff gave in evidence a memorandum signed by the defendant in the following words: "1838, 19th *September*, I O U 20*l*. *Jane Rickards*," and also a letter from the defendant, admitting that she was indebted to the plaintiff in the sum of 5*s*. The counsel for the defendant objected to the reception of the former, as it was without any direction, and there was no proof it had been given by the defendant to the plaintiff, and that being a document which might pass from hand to hand, it amounted in effect to a negotiable instrument, and should have been stamped. The learned Judge over-ruled the objection, and left it to the jury to say, whether the plaintiff had not made out a sufficient case to entitle him to a verdict for 20*l*. 5*s*. The jury having found their verdict for that amount,

Bompas, Serjt. now moved for a new trial, unless the plaintiff would consent to the verdict being reduced to 5*s*. He contended, that the objection made at the trial to the reception, in evidence of the I O U, was well founded, and that the summing up of the learned Judge, whereby he intimated to the jury, that they might find their verdict for the plaintiff in respect of the 20*l*. with-

out any further evidence, was in effect a misdirection. The document not being directed, the plaintiff should have proved that it had been given to him by the defendant. If any party into whose hands it may pass may sue upon it without shewing how it was obtained, then it is, in fact, a negotiable instrument, and ought to be stamped. (*a*)

The memorandum not being an account stated on the face of it, something more than mere production is required to bring it within the last count of the declaration. *Green* v. *Davies* (*b*) is an authority to shew, that if an admission of a debt cannot be brought within the count on an account stated, it cannot be used at all. [*Erskine* J. Was not the fact of its being produced by the plaintiff evidence from which the jury might infer that it had been given to him by the defendant?] Every holder would be entitled to have the same presumption made in his favour. [*Tindal* C. J. The fallacy of your argument consists in your assuming that the document has been handed over. Where a letter is given in evidence with the direction torn off, it will be presumed *primâ facie* that it was addressed to the party who produces it. A document like the present may certainly be abused.] The liability to abuse is a strong argument against it. The real question is, whether the mere production of the document is evidence that the plaintiff received it from the defendant. It can only be used for the purpose of shewing that there has been an account stated between the parties, and it may have been handed over for that express object. It is not sufficient, in giving a deed thirty years old in evidence, to produce it, but it must be shewn how such deed came into

(*a*) To support this objection, I O U must be read "I owe the bearer;" but "I owe the bearer" would not prove an account stated, whether stamped or unstamped. And see *Early* v. *Bowman*, 1 *B. & Adol.* 889.

(*b*) 4 *B. & C.* 235.; 6 *D. & R.* 235., and see *Ashby* v. *Ashby*, 3 *Moo. & P.* 186.

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the party's custody. So here the plaintiff should have adduced some proof that the memorandum was given to him; for there is nothing on the face of it to shew that it was given to one individual more than to another.

TINDAL C. J. I am of opinion that this case was properly left to the jury. It strikes me that the document is to be considered without reference to the stamp act. According to the evidence, there was no one but the plaintiff to whom the "U" in the document could be applied. It is impossible for us to assume that it referred to any other person, without assuming facts which are not before the Court. If a plaintiff were required to prove that the memorandum was given to him by the defendant, he might not be able to do so, as these documents are often given when none but the two parties to them are present; whereas, if the paper has been in the hands of other persons, the defendant may call evidence to shew that fact. It is also to be observed that, in *Fisher* v. *Leslie* (*a*), there was no direction to the I O U, yet this point was not taken; and many cases have occurred before me at *Guildhall* and elsewhere in which similar documents have been given in evidence without the present objection being raised.

BOSANQUET J. I am also of opinion that there is no ground of objection to the way in which this case was left to the jury. I agree with the Chief Justice that the document is to be considered without reference to the stamp act. Assuming it to relate to the plaintiff and the defendant, it is a sufficient acknowledgment of a debt to be received in evidence on the account stated.

It was produced by the plaintiff; but it is suggested that it might easily have been transferred to him by the person to whom it was given. We are not, however, to

(*a*) 1 *Esp. N. P. C.* 427.

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presume that it was handed over to him by any other party. The question is, where a plaintiff produces an I O U which has no direction, whether it is not *primâ facie* evidence for him to go to the jury. I think it is, and that the defendant, if he means to contend that it was not given to the plaintiff, must shew that it has been in the hands of some one else.

COLTMAN J. It seems to me that the presumption arising from the production of the I O U, although not very strong, was one which, if not shaken by other evidence, established a sufficient case for the plaintiff. But his case did not rest simply on the production of the document. It appears there were other transactions between the parties, which in some degree strengthened the presumption that the document had been given by the defendant to the plaintiff. If the defendant had proved that the plaintiff and he were strangers to each other, or had adduced other evidence to shew the improbability of the document's having passed originally from him to the plaintiff, the jury might have come to a different conclusion from that at which they arrived.

ERSKINE J. The mere circumstance of the document being produced by the plaintiff was evidence from which the jury might draw the conclusion, that the defendant owed the sum therein specified to the plaintiff. In order to get rid of that inference, the defendant should have given some other evidence. It has been said that the defendant had no notice that such a document would be adduced, and therefore could not be prepared with proof to rebut it at the trial; but in moving for a new trial he might have come with affidavits, shewing that the memorandum had been in the hands of other parties.

Rule refused.

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May 12.

GINGELL *v.* BEAN.

WILDE, Solicitor-General, had obtained a rule to shew cause why a rule obtained by the defendant on the 22d of *April* last, for judgment as in case of a nonsuit, should not be discharged, and all proceedings had thereon be set aside for irregularity, with costs. On the 13th of *January* the defendant had obtained a rule *nisi* for judgment as in case of a nonsuit, which was discharged on the 20th of *January*, upon the plaintiff's giving the usual peremptory undertaking to proceed to trial at the sittings after the then *Hilary* term. On the 22d of *April*, the defendant obtained a rule, absolute in the first instance, for judgment as in case of a nonsuit, upon an affidavit of the clerk to the defendant's attorney, that the plaintiff had not proceeded to trial pursuant to the rule of the 20th of *January* and his said undertaking. The rule of the 20th of *January* had never been drawn up until the 13th of *March*, when the clerk to the defendant's attorney procured it from the office of the Court, for the purpose of annexing it to his affidavit, upon which the rule of the 22d of *April* was obtained. The affidavits upon which the present rule was founded, stated that the plaintiff's attorney had never been served with any rule containing a peremptory undertaking on the part of the plaintiff to proceed to trial.

Although the general practice may be for one party to the suit to draw up a rule obtained in the progress of a cause, if the other party wishes to act upon it, he should draw it up within the time to which it relates; for if not drawn up within such period, it is to be considered as having been abandoned.

Where the defendant, in *Hilary* term, obtained a rule *nisi* for judgment as in case of a nonsuit, which was discharged on the plaintiff's agreeing to give a peremptory undertaking to try at the sittings after the term, but the rule containing the peremptory undertaking was not drawn up until the 13th of *March*, which was after the time to which it referred had expired, and the defendant in *Easter* term obtained a rule absolute in the first instance for judgment as in case of a nonsuit, the Court set such judgment aside for irregularity.

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Slee, Serjt., now shewed cause. The substance of the plaintiff's complaint is, that his attorney was never served with the rule containing a peremptory undertaking to go to trial. This was not necessary, as the giving of the undertaking was the act of the plaintiff, by means of which he got the rule *nisi* for judgment as in case of a nonsuit discharged. In practice, the rule containing the peremptory undertaking is never served by the defendant on the plaintiff, but the usual course is for the latter to draw up the rule.

Wilde, Solicitor-General, in support of the rule. The objection is, not that the rule containing the peremptory undertaking never was served, but that it never was drawn up until the proper time for that purpose had expired. Until a rule is drawn up it may be abandoned, and where a party wishes to take advantage of it, he is bound to draw it up. It may be admitted that the general practice is for the plaintiff, who gives the peremptory undertaking, to draw up the rule; but if the defendant wants to enforce it, he should draw it up. Or he may come to the Court, and, stating that the plaintiff has not drawn up the rule, pray that the original rule for judgment as in case of a nonsuit may be made absolute. But although the defendant may draw up the rule, he cannot lie by until the time for trial, referred to by the peremptory undertaking, has expired; for where rules are intended to be enforced, they must be drawn up within the period in which they are to be acted upon, for otherwise they become a nullity, and fall to the ground. Here the rule was not drawn up until the 13th of *March*, a period subsequent to the time when the plaintiff should have gone to trial, had the rule been properly drawn up. The rule being, therefore, surreptitiously drawn up, there never was any peremptory undertaking given by the plaintiff at all.

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BOSANQUET J. (*a*) We understand from the officer, where a motion for judgment as in case of a nonsuit, is discharged, on the plaintiff's agreeing to give a peremptory undertaking to go to trial, and the rule for discharging the motion has not been drawn up until the proper time for doing so is expired, that such rule is considered as having been abandoned. As there was, therefore, no peremptory undertaking in this case, on which the rule for judgment as in case of a nonsuit obtained by the defendant, could be founded, that rule was wrong, and must be set aside.

COLTMAN J. The rule of practice, as certified by the officer, seems to be a reasonable one.

ERSKINE J. The rule containing a peremptory undertaking by the plaintiff to go to trial, may be drawn up by either party. It is generally drawn up by the plaintiff; but if the defendant wishes to act upon it, then the officer states that the proper course for the latter to take is, to draw it up within the time to which it relates; for if not drawn up until after that period is expired, it is to be considered as abandoned, and the defendant cannot make use of it. The judgment obtained by the defendant was therefore irregular, and must be set aside.

Rule absolute with costs.

(*a*) *Tindal* C. J. had left the Court during the argument.

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RICKARDS and Wife *v.* MIDDLETON.

April 27.

ANDREWS, Serjt. had obtained a rule *nisi* for judgment as in case of a nonsuit. Issue had been joined on the 18th of *November* last, and notice of trial given for the sittings after the then *Michaelmas* term. The plaintiffs afterwards withdrew the record.

Bompas, Serjt. now shewed cause, and objected, that the cause was not at issue. It appeared from his affidavit, that after the record was so withdrawn, the plaintiffs had amended their replication under a judge's order obtained on the 24th of *January;* that on the 28th the defendant's attorney had delivered a rejoinder to the amended replication, concluding to the country, and that no surrejoinder had since been delivered.

TINDAL C. J. The question is, whether the cause was at issue when the rule was obtained; it clearly was not until the *similiter* was added.

Rule discharged, the costs to be costs in the cause. (*a*)

There can be no rule for judgment as in the case of a nonsuit, when the cause is not completely at issue, although it may have been so at a former period. Where, therefore, the plaintiffs, after giving notice of trial, had withdrawn the record, and afterwards amended their replication, to which the defendant had delivered a fresh rejoinder, concluding to the country, but no surrejoinder had been delivered, the Court discharged a rule obtained by the defendant for judgment as in case of a nonsuit.

(*a*) See *Brook* v. *Lloyd, Tyrwh. & G.* 924.

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May 8.

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Although an attorney's bill contains items not specified according to the 2 *G.* 2. *c.* 23. *s.* 23., he may still recover the portion of his bill, as to which the provisions of the statute have been complied with.

Seven items in the bill were stated in the aggregate; but two only were found by the arbitrator, to whom the cause had been referred, to be for business done at law or in equity: Held, that the plaintiff might recover the five other items.

THIS was an action of *assumpsit*. The declaration contained three counts; the first for 400*l*. for work and labour done by the plaintiff as an attorney and solicitor for the defendant, and for fees; the second for the same sum for money paid by the plaintiff for the use of the defendant; and the last for the same sum on an account stated between the plaintiff and defendant. The defendant pleaded to the whole declaration: 1st, *Non assumpsit*. 2dly, The statute of limitations. 3dly, Payment. 4thly, A set-off. 5thly, That the first and second counts were for fees, charges, and disbursements due to the plaintiff as an attorney for the defendant at law; that the account was stated of the same matters; and that no signed bill of such charges and disbursements had been delivered by the plaintiff as required by the statute in such case made and provided.

The plaintiff joined issue on the first plea, and traversed the second and third, on which issue was joined by the defendant. To the fourth, the plaintiff replied the statute of limitations, which the defendant tra-

An attorney is bound to deliver to his client a bill, containing his whole charges: a delivery of a bill, containing only the items of the extra costs, and omitting the items of taxed costs which have been received from the other side, is not a sufficient compliance with the statute.

An attorney who has several demands against his client, some of which are barred by the statute of limitations, has no right to appropriate, in payment of the demands so barred, a sum received by him on account of his client for damages recovered in an action.

The defendant having a claim against the plaintiff, the latter at the foot of his bill acknowledged the debt as follows: — "By Mr. *Lacy*'s bill," leaving a blank for the amount. He then wrote below, "Agreeably to your request, above I send you my bill, which I will thank you to peruse, and if correct, favour me with a bill for the balance." Held, that this was a sufficient acknowledgment of the defendant's claim to take it out of the statute of limitations.

versed by his rejoinder; on which issue was joined. To the last plea the plaintiff replied, that he had delivered such a bill, on which issue was joined.

The cause came on for trial before *Tindal* C. J., at the sittings for *London* after *Easter* term last, when a verdict was, by consent, taken for the plaintiff for the damages laid in the declaration, subject to the award of a gentleman at the bar, who was empowered to direct that a verdict should be entered as he should think fit, and to state on the face of his award, at the request of either party, any points of law for the opinion of the Court which he should think proper.

The arbitrator, on the 12th of *January* 1839, made his award, whereby he directed a verdict to be entered for the plaintiff on the general issue, damages, 166*l.* 2*s.* 6*d.*, subject to the opinion of the Court upon the points thereinafter reserved, and to be reduced by the collective amount of the sums for which a verdict should be directed to be entered for the defendant on other pleas and issues as thereinafter mentioned; and he directed a verdict to be entered for the plaintiff on the second issue; and as to 50*l.*, part of the sum mentioned in the third plea pleaded to the action, he directed a verdict to be entered for the defendant; and as to the residue of the plea, he awarded a verdict to be entered for the plaintiff; and as to 61*l.* 2*s.* 4*d.*, part of the sum mentioned in the fourth plea pleaded to the action, he directed a verdict to be entered for the defendant; and as to the residue of the plea, he awarded a verdict to be entered for the plaintiff, subject to the opinion of the Court on the case thereinafter reserved; and as to 23*l.* 2*s.*, part of the sum mentioned in the fifth plea pleaded to the action, he directed a verdict to be entered for the defendant; and as to the residue of the plea, he awarded a verdict to be entered for the plaintiff, subject to the opinion of the Court upon the points thereinafter re-

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served. The arbitrator then directed the following case to be submitted for the opinion of the Court: —

This was an action by an attorney to recover the amount of his bill. It was commenced in *May* 1837. A month before action brought, the plaintiff delivered to the defendant a bill duly signed by him, containing the particulars of his demand, which consisted of disbursements and charges for business done by him as an attorney for the defendant, in divers suits and other matters, at various times from the year 1828 until the end of 1836. The charges in respect of several of those suits and matters were duly stated in the bill, the particular items of which they consisted being specified; but the bill contained several other charges, which were stated in the aggregate only, as follows: —

To sale of *Woodfall*'s premises -	£5	6	8
Brig *Iceni* - - - -	3	8	2
Yourself and *Dickenson* - - -	5	10	0
Petition to Exchequer -	3	4	0
Ingersoll's annuity - - -	4	4	2
Contract with *Grimsdell* - - -	6	10	0
General business - - -	17	12	1

None of the foregoing items was for business done at law or in equity, except the third and the last.

Separate bills for the two latter charges had previously been delivered by the plaintiff to the defendant, in which the particular items of which they consisted were duly specified; but these bills were not signed by the plaintiff. Some of the particulars of plaintiff's demand consisted of extra costs, which were not allowed by the Master on taxation, against the unsuccessful parties in actions which the plaintiff conducted successfully on behalf of the defendant. But the items of those extra costs only were set forth in the bill; no other portions of the bills which were laid before the Master for taxation

in respect of the said actions being therein stated. The defendant having cross demands against the plaintiff for commodities supplied by him as a tavern keeper to the latter at various times, from the year 1828 until the end of 1836, and also for money had by the plaintiff from a third party on account of the defendant; the plaintiff, at the foot of the bill which he delivered containing the particulars of his demand as aforesaid, gave credit to the defendant for the money he had received, and left a blank for the amount of the defendant's bill, in order that the amount thereof might be deducted from his own demand, and requested the defendant to favour him with the balance in the following form; that is to say, —

22d *May* 1839. By damages recovered by *King*, 17*l.*
By Mr. *Lacy*'s bill, - -

Dear Sir, — Agreeably to your request, above I send you my bill, which I will thank you to peruse, and if correct, favour me with a bill for the balance.

Your obedient servant,
George Waller.

The above was signed by the plaintiff himself. Besides other pleas, the defendant pleaded a set-off, to which the plaintiff replied the statute of limitations, upon which issue was joined. The defendant, in support of his plea of set-off, proved the aforesaid cross demands.

The questions submitted for the opinion of the court upon the above facts were, 1st, Whether the bill signed and delivered by the plaintiff to the defendant as aforesaid, was sufficient within the statute in that behalf made to enable the plaintiff to maintain this action for any portion thereof? 2dly, Whether the charges, which were stated in the aggregate only, were sufficiently specified to entitle the plaintiff to recover any portion thereof? 3dly, Whether the charges, in respect of

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extra costs, were sufficiently stated to enable the plaintiff to recover the amount thereof? 4thly, Whether the plaintiff had a right to appropriate, in liquidation of any part of his demand, the aforesaid sum of 17*l.*, which was received by him of *King*, on account of the defendant, without the knowledge of the latter? 5thly, Whether any portion of the defendant's set-off was barred by the statute of limitations?

If the Court decided the first question in the negative, the arbitrator directed a verdict to be entered for the defendant on the 5th plea.

If the Court decided the first three questions in the affirmative, he directed a verdict to be entered for the plaintiff on that plea as to 137*l.* 19*s.* 6*d.*, in respect of the 1st and 3d questions; and such further sums as the Court should decide, he was entitled to recover in respect of the second question, parcels of the sum mentioned in the said plea; and he awarded a verdict to be entered for the defendant as to the residue (if any) of the said plea.

If the Court decided the first question in the affirmative, and the second and third questions in the negative, he directed a verdict to be entered for the plaintiff as to 112*l.* 19*s.* 6*d.*, part of the sum mentioned in the said plea, and for the defendant as to the residue of the said plea.

If the Court decided the first and second questions in the affirmative, and the third in the negative, he directed a verdict to be entered for the plaintiff on the said plea as to 112*l.* 19*s.* 6*d.*, in respect to the first question, and such further sum as the Court should decide that the plaintiff was entitled to recover in respect of the second question, parcels of the sum mentioned in the said plea; and he awarded a verdict to be entered for the defendant as to the residue of the said plea.

If the Court decided the first and third questions in

the affirmative, and the second in the negative, he directed a verdict to be entered for the plaintiff on the said plea as to 187*l.* 19*s.* 6*d.*, parcel of the sum mentioned in the said plea, and for the defendant as to the residue of the said plea.

If the Court decided the fourth question in the affirmative, he directed that the Court should not take into consideration the last item of the aforesaid charges stated in the aggregate, namely, "General business, 17*l.* 12*s.* 1*d.*;" and he awarded the damages which he had awarded to the defendant on the fifth plea as aforesaid to be reduced from 23*l.* 2*s.* to 6*l.* 2*s.*, subject to the opinion of the Court on the other points as aforesaid.

If the Court decided the fifth question in the negative, he directed a verdict to be entered for the defendant on the fourth plea and last issue.

In *Hilary* term, 1839, the defendant obtained a rule to show cause why so much of the award as directed the verdict to be entered contrary to the entries hereinafter mentioned should not be set aside, upon the ground that the facts set out in the award entitled the defendant to have the verdict entered as herein mentioned; and that the verdicts might be entered on the general issue for the plaintiff as to 166*l.* 2*s.* 6*d.*; on the statute of limitations for the plaintiff as to 166*l.* 2*s.* 6*d.*; and for the defendant as to the residue; on the plea of payment, for the defendant for 50*l.*, and for the plaintiff on the residue; on the plea of set-off, for the defendant; on the plea of no signed bill, for the defendant; or that the verdict for the plaintiff on that issue be reduced.

The case having been set down in the special paper, now came on for argument.

Talfourd, Serjt. (with whom was *Hance*) for the plaintiff. With regard to the first question submitted for the opinion of the Court, it seems to have been thought at

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one time that an attorney is not entitled to recover on a bill which does not specify all the items it contains; but *Drew* v. *Clifford* (*a*) clearly establishes that he may recover the portion of his demand as to which the provisions of the statute of the 2 *G.* 2. *c.* 23. *s.* 23. have been complied with. [*Bramwell*, for the defendant, admitted the authority of *Drew* v. *Clifford*, and gave up this point.]

With respect to the second question, relative to the charges stated in the aggregate, it may be admitted, as the arbitrator has found that the third and last charges were for business done at law or in equity, that the plaintiff cannot recover as to them. With regard to the five other items, as the plaintiff could have maintained an action for them without delivering a bill at all, he has a right to recover them, although a bill, in which they are imperfectly described, has been delivered. These items are clearly not taxable, but the objection is, that as the plaintiff had a claim for business that was taxable, he could not sever non-taxable items from his demand, but should have delivered a signed bill for the whole. Formerly, when it was thought that the Court possessed a right at common law, under which they could refer an attorney's bill at any time to be taxed, it was considered he must deliver a bill for the whole amount of his claim; *Thwaites* v. *Mackerson* (*b*); but that case has been over-ruled by *Becke* v. *Penn.* (*c*) There *Tindal* C. J. held, that an attorney is not bound by the statute to deliver a bill of non-taxable matters. The words of the statute are, (*s.* 23.) "no attorney or solicitor of any of the courts aforesaid shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until," &c. The statute is therefore clearly only applicable to fees and disbursements of a taxable nature.

(*a*) *Ryan & Mood. N. P. C.* 280., 2 *C. & P.* 69.

(*b*) 3 *C. & P.* 341.

(*c*) 7 *C. & P.* 397.

The third point is, whether the extra costs are sufficiently stated. The question is, whether an attorney, on suing his own client, is bound to set out, not only the items which he could not recover from the opposite party, but also the costs which have already been taxed by the Master, and paid by the other side. There can be no possible object in stating the latter charges over again. [*Tindal* C. J. It does not appear that the defendant has ever had a copy of the other bill. Why should he not have the power of taking that bill before the Master, with a view of reducing the extra costs?] If it be necessary to refer to the former bill, to see whether any of the items of the extra costs are comprised in it, the Master may do so, as all bills of costs, after being taxed, are filed in his office. It may be said, that the client himself should have an opportunity of ascertaining whether the extra costs were not included in the former bill. But the attorney has a right to stand upon the statute, and to say that its words cannot be enlarged, which apply only to such fees and disbursements as he seeks to recover from his client, and that he is not bound to furnish the latter with a bill of the costs between party and party which have been paid, and to which, having been allowed on the former taxation, the client cannot now raise any objection.

Fourthly, the plaintiff had a right to appropriate the 17*l.* received by him on account of the defendant. When the plaintiff's bill was sent in, the defendant might then have appropriated it as he thought proper; but not having done so, it was too late to take the objection before the arbitrator, and the plaintiff was entitled to apply it to any part of his bill. Where the demand does not arise from any claim that is *malum in se*, the right clearly exists. This is shewn by *Cruickshanks* v. *Rose* (*a*), which was a stronger case than the present.

(*a*) 1 *Moo.* & *R.* 100.

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There Lord *Tenterden* held that a party might apply general payments to an account for spirituous liquors, for which he could not have maintained an action. *Philpott* v. *Jones* (*a*) is to the same effect.

The fifth question is, whether any portion of the defendant's set-off is barred by the statute of limitations, or it is taken out of the statute by the document set forth. *Lechmere* v. *Fletcher* (*b*) undoubtedly establishes, that where the amount of the debt is left blank in the acknowledgment or promise required by the 9 *G.* 4. *c.* 14. *s.* 1., it may be supplied by parol evidence. In other respects, however, that case is distinguishable. There the promise referred to a debt that might be ascertained — here the amount due is uncertain. Also, there the whole demand was beyond the six years, but here only a portion was incurred beyond that time; and it may be that the plaintiff merely intended that the defendant should deduct the part which he was then legally liable to pay.

That case further differs from the present in this respect, that it contained an express promise to pay, whereas here there is a mere permission to deduct. Moreover, according to the finding of the arbitrator, there is nothing due to the plaintiff, and, consequently, in order to hold that this document takes the case out of the statute, the Court must turn the permission to deduct into a promise by the plaintiff to pay the balance that is in fact owing to the defendant, which it is clear the plaintiff never intended to do. The recent authorities shew that a new admission is not sufficient to take the case out of the statute; that there must either be an express promise to pay, or an acknowledgment from which a promise can be inferred. *Kennett* v. *Milbank* (*c*) is to this effect. So here, to satisfy the statute,

(*a*) 2 *A.* & *E.* 41.
(*b*) 3 *Tyrwh.* 450.
(*c*) 8 *Bingh.* 38., 1 *Moore* & *S.* 102.

the admission must involve a promise to pay, but the inference of such a promise is inconsistent with the facts as found by the arbitrator.

With respect to there being accounts current between the parties, that circumstance is not sufficient, since the 9 G. 4. c. 14. s. 1., to take the case out of the statute; *Williams* v. *Griffiths* (a), *Mills* v. *Fowkes*. (b)

Bramwell for the defendant. With regard to the second question, if it had been *res integra* there might have been some difficulty in contending, on the words of the statute, that an attorney must deliver a signed bill as well of those items which are not taxable as of those that are. But the authorities are uniform on the point prior to the case of *Becke* v. *Penn*. (c) In *Wardle* v. *Nicholson* (d) it was held, that an attorney who has not delivered any bill to his client before action brought, but has delivered particulars of demand, containing some taxable items, after action brought, cannot recover for an item not taxable, if such item be in respect of business done, or money paid to his client's use, in his character of attorney. So in *Smith* v. *Taylor* (e) this Court decided, although only two out of many items were of a taxable nature, that the attorney could not recover any part of his demand, he not having delivered a signed bill. [*Bosanquet* J. It is stated in *Archbold's Practice, by Chitty*, p. 71., seventh edition, that those cases were decided "during the time the courts thought they had a common-law jurisdiction to compel the taxation of an attorney's bill."] The cases cited were put on the ground that the statute had not been complied with, and not that the courts possessed any authority at common

(a) 5 *Tyrwh.* 748., 2 *Cr. M. & R.* 45.
(b) 5 *New Cases*, 455.
(c) 7 *C. & P.* 397.
(d) 4 *B. & Ad.* 469.; 1 *Nev. & Mann.* 355.
(e) 7 *Bingh.* 259., 5 *M. & P.* 66.

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law. *Becke* v. *Penn*, when examined, is not opposed to those decisions; for the issue raised by the pleadings was whether certain items were taxable or not, and at the trial the defendant could do nothing but contest that fact.

As regards the extra costs, it is said they are sufficiently stated, because the attorney seeks to recover them only from his client, and not the costs which he has already received from the other side. The client, however, is liable for the whole costs; and if the other side had been unable to pay the costs as between party and party, he must have paid them to the attorney. If the latter were to bring an action for the whole costs, the client must plead the costs received from the other party as matter of set-off. The proposition is therefore incorrect, that the attorney seeks to recover only the extra costs; his demand is for the whole, but he is willing to allow the amount paid to him by the other party. The question is, has a bill been delivered which the Master can tax? Until he has had the whole costs laid before him, he cannot ascertain whether the extra costs should be allowed. The attorney might otherwise recover an item from his client which he had already received from the other party. It has been said, that the Master can tax the extra costs by referring to the former bill, but the point is, has the statute been complied with? It does not follow that the client wants to have the extra costs taxed; but he may wish to see the whole costs, in order to judge whether or not the extra costs are proper charges. To comply with the statute, the bill must be one that the party can act upon at the time, and without reference to any thing else. By his replication the plaintiff admits that all his charges are for taxable items, but he says he has delivered a signed bill; he can therefore only recover for items included in such bill.

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With respect to the fourth question, it is said that the defendant has waived his right of applying the 17*l.*, and has allowed it to be appropriated by the plaintiff. This is not so; for the arbitrator finds that it is due to the defendant, and that unless the plaintiff have a right to appropriate it, the defendant is entitled to a verdict for that amount. The question in the abstract is, whether a party can appropriate a sum of money due by way of set-off. It is submitted that the doctrine of appropriation does not apply to cases of set-off. Supposing a plaintiff to declare for 100*l.*, and the defendant pleads the statute of limitations and a set-off, and the jury find that 50*l.* is barred by the statute, and that 50*l.* is due to the defendant on the set-off, it is impossible to contend that the latter sum may be appropriated in payment of the amount barred by the statute. If this were so, a plea of set-off would be of no use to a defendant; for a plaintiff would only have to put some claim which he could not support, into his declaration in order to get rid of the set-off. The principle on which the doctrine of appropriation is allowed in cases of payment is very clear; but it is not applicable where a party has received a sum of money due to another person without the knowledge of the latter.

As regards the question whether the defendant's set-off is barred, it is submitted that there is here a sufficient acknowledgment or promise within the statute. In *Bird* v. *Gammon* (*a*) it was held, that it was properly left to the jury to say what was the effect of the letter relied on in that case. Here the arbitrator is in the situation of a jury; and he has found that the plaintiff left a blank at the foot of his account for the amount of the defendant's bill, in order that the latter might deduct the amount from the plaintiff's demand, and send him the balance.

(*a*) 3 *New Cases*, 883., 5 *Scott*, 213.

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The defendant's letter is a clear admission that something is due to the defendant. In *Haydon* v. *Williams* (*a*), *Tindal* C. J., in delivering the judgment of this Court, stated that the 9 *G.* 4. *c.* 14. "did not intend, as it appears to us, to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof." The old authorities are consequently still in point. In *Colledge* v. *Horn* (*b*), a letter containing no admission of any specific balance, but only an acknowledgment that something was due, but not the amount claimed by the plaintiff, was held sufficient to take the case out of the former statute of limitations. *Lechmere* v. *Fletcher* (*c*), is an express authority that the acknowledgment need not specify the amount of the debt, which may be shewn by extrinsic evidence. *Bird* v. *Gammon* (*d*) also decides the same point. So in *Dickinson* v. *Hatfield* (*e*), where the defendant promised, by letter, to pay "the balance," without specifying any particular amount, Lord *Tenterden*, by whom the 9 *G.* 4. *c.* 14. was framed, said, "The act does not require the amount of the debt to be specified. Before it passed, a verbal promise to pay the balance would have entitled the plaintiff to recover. A similar promise in writing will have the same effect since."

It is said that the plaintiff's letter, if an acknowledgment at all, is only an acknowledgment of such part of the defendant's claim as was not already barred by the statute; but no such distinction is recognised in the cases. Such a construction would give to an acknowledgment which bore no date, a fluctuating effect, and the longer the plaintiff was in bringing his action, the

(*a*) 7 *Bingh.* 163.
(*b*) 3 *Bingh.* 119., 10 *Moore*, 431.
(*c*) 3 *Tyrwh.* 450.
(*d*) 3 *New Cases*, 883., 5 *Scott*, 213.
(*e*) 1 *Moo. & R.* 141.

smaller would be the portion of the demand to which the acknowledgment was applicable. Here the expression, "by Mr. *Lacy*'s bill," necessarily means the whole bill, without any limitation.

It is also contended, that if this be an acknowledgment, it is only such an acknowledgment as will leave a balance to come to the plaintiff. But the fact that a balance is due on the whole to the defendant cannot affect the question, whether there is not a sufficient acknowledgment to take the case out of the statute.

It is submitted that the case is likewise taken out of the statute by the cross accounts existing between the parties. *Williams* v. *Griffiths* (*a*) appears to have been decided without much consideration; and in *Mills* v. *Fowkes* (*b*) the point was conceded by the plaintiff's counsel without argument. The question is, whether the recent statute has altered the law in this respect. If so, a plaintiff whose claim has been kept alive by some payment on account, may lie by until the defendant's claim is barred, and then commence an action for the amount due to him, although he is in reality indebted in a larger sum to the defendant. The legislature could never intend to pass an act which might be productive of such great injustice.

Talfourd Serjt. in reply. With regard to the second question, although the opinion of *Tindal* C. J. in *Becke* v. *Penn* (*c*) was not necessary for the decision of that case, yet it was expressly given after the point had been raised and argued. At all events, it does not appear that the five items were due to the plaintiff in his character of an attorney.

As respects the extra costs, it may be admitted that

(*a*) 5 *Tyrwh.* 748., 2 *Cr. M.* & *R.* 45

(*b*) 5 *New Cases*, 455., 7 *Scott*, 444.

(*c*) 7 *C.* & *P.* 397.

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the plaintiff might have brought his action for the whole costs; but he has not done so; and the fair construction of the act is, that he is only bound to deliver a bill of the specific items for which he proceeds. [*Tindal* C. J. The practice is to deliver a bill of the whole costs, giving credit for the costs received from the other side.] Supposing the attorney to do so, the client would only know that the former had given him credit for a certain sum on the whole demand; for at any rate the attorney is not bound to set out the former bill as taxed by the Master, and therefore the client would have no more information than he had before.

With respect to the right of the plaintiff to appropriate the 17*l.*, the general principle on which the right of appropriation depends is not disputed; but it is contended that the plaintiff had a lien on the amount, and therefore it is to be considered rather in the light of a payment than as a set-off.

As regards the last question, the distinction between the present case and *Lechmere* v. *Fletcher*, and the other authorities cited, is, that those were cases of parties acknowledging that a debt was due from them, whereas here the plaintiff claims a balance as owing to him. The question, therefore, is, can the Court, in addition to supplying the blank, engraft a promise to pay upon the plaintiff's letter, which merely authorises something to be deducted from his account?

TINDAL C. J. No question has been raised in this case as to the mode in which the judgment is ultimately to be entered up upon the finding of the Court. We shall therefore limit ourselves to giving an opinion upon the five abstract points submitted for our consideration, leaving the parties themselves to shape our finding on the record.

First point. The first question is, whether the signed bill de-

livered is sufficient within the statute of the 2 *G.* 2. *c.* 23. *s.* 23. to enable the plaintiff to maintain his action for any portion thereof. On that we all agree that it is sufficient to enable the plaintiff to support an action for some part of his demand.

Second point.

The second question is, whether the charges stated in the aggregate are sufficiently specified to entitle the plaintiff to recover any portion thereof. It appears that there are seven charges not stated by particular items but by general sums. As regards two of those items the statement is clearly insufficient, for it is found by the arbitrator that they were charges for business done at law or in equity. With respect to the five other items the same objection does not exist; for they are not found to be charges for business done at law or in equity, neither are they found to be for business done by the plaintiff in his character of an attorney. As the declaration, in addition to the count for work and labour done by the plaintiff as an attorney, contains counts for money paid, and on an account stated, and as it is not specifically pointed out that those items fall within the first count, we are not bound to make any inference against the plaintiff, but may pass them over as charges which may be recovered under the other counts in the declaration.

Third point.

The third question is, whether the charges in respect of extra costs are sufficiently stated; and it appears to me they do not comply with the requisites of the statute. Those charges by themselves are not intelligible to the officer of the Court. An attorney's bill, generally speaking, ought to give a history of the cause, so as to enable the officer to judge of the propriety of the various items of which it is composed; but if part only of the charges are set forth he has not sufficient materials whereon to form his judgment. A delivery of a bill containing merely the extra costs is certainly not

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according to the general practice, which is for the attorney to deliver a bill of the whole costs, giving his client credit for the sum that has been received. Here these separate and disjoined items do not furnish the necessary information, and are consequently not a sufficient compliance with the statute, which requires a bill to be delivered for the purpose of enabling the client, should he think proper, to have it taxed. I therefore think that these five items cannot be allowed to form part of the plaintiff's demand.

Fourth point.

The fourth question is, whether the plaintiff had a right to appropriate, in liquidation of any part of his demand, the 17*l.* received of *King*. It seems to me that he had no such right. It is not disputed that, as regards a payment, where the party paying does not appropriate the money, the party receiving it may; for it is the fault of the payer if he omit to exercise the right of appropriation of the sum so paid. But this is not the case of a payment at all, but of a sum of money received without the knowledge of the defendant. Therefore, inasmuch as the latter never had the power of exercising any election as to the application of this sum, the right of the plaintiff to appropriate it never arose.

Fifth point.

The fifth question is, whether any portion of the defendant's set-off is barred by the statute of limitations; that is, in effect, to inquire whether there has been any acknowledgment that will take it out of the statute. The set-off arose partly from a sum of 17*l.*, which the plaintiff received in 1833 on account of the defendant, and partly from a tavern bill contracted by the plaintiff with the defendant between the years 1828 and 1836. A part, therefore, of this bill would be excluded, unless what has taken place prevented the operation of the statute. It appears that the plaintiff, on sending in his bill, gave credit at the foot, for the

17*l.* received of *King*, and added, "By Mr. *Lacy*'s bill," leaving a blank for the amount. He then wrote below, "Agreeably to your request, above, I send you my bill, which I will thank you to peruse, and, if correct, favour me with a bill for the balance." It appears, by necessary inference, that this document must have been delivered more than a month before the action was commenced. So far as relates to the 17*l.*, it is a direct acknowledgment by the plaintiff that he has received that sum on behalf of the defendant. The only question, therefore, is with respect to the defendant's bill. The cases are strong to shew that, though the amount be not specified in the acknowledgment, it may be supplied by parol evidence. I think that here the plaintiff, when writing in this way to the defendant, is speaking of something known between the parties, although he cannot state the precise amount. It seems to me that the cases go the full length of establishing that this is a sufficient acknowledgment. In *Dickinson* v. *Hatfield* (*a*), which occurred soon after the passing of the act, Lord *Tenterden* himself held that the promise, in the letter produced, to pay "the balance" was sufficient to take the case out of the statute, although the amount of such balance was not stated. It is said here that the plaintiff does not admit a balance to be due from him, because he claims one from the defendant; but the words are to be taken according to the subject-matter. Here the word "bill" is the same as "balance" in *Dickinson* v. *Hatfield*, and you may let in parol evidence as well in the one case as in the other. *Lechmere* v. *Charlton* is also a strong authority to the same effect. It therefore seems to me that the defendant's set-off is not barred, inasmuch as there is here a sufficient acknowledgment to take the case out of the statute.

(*a*) 1 *Moo. & R.* 141.

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BOSANQUET J. With respect to the first question, I also think that the bill delivered was sufficient to enable the plaintiff to maintain an action for a portion of his demand.

First point. Second point. As regards the second question, it appears to me that the statute has not been complied with, so far as relates to the two items for business done at law or in equity. But with respect to the other five charges which are found not to be taxable, it appears to me that the plaintiff was under no obligation to state them in any other manner than he has done, inasmuch as they do not fall within the statute. If the defendant had wanted fuller information, he might have applied for a bill of particulars.

Third point. The next question is, whether it was incumbent on the plaintiff, in order to recover the extra costs, to set them out more particularly. It is quite unreasonable to state them in the manner he has done, without giving his client, by the delivery of his whole charges, an opportunity of judging of their propriety; for the client cannot form any judgment as to the correctness of the extra costs, unless he knows what costs have been allowed by the Master against the other party.

Fourth point. With respect to the right of the plaintiff to appropriate the 17*l.*, whatever right of appropriation a party may have over a sum paid to him, he has no such right over money in his hands belonging to another person. It is only proper that a party should have the power to appropriate a payment made to him without any special application; but the doctrine of appropriation cannot apply to the present case, where money has come to the plaintiff's hands, not by the act of the defendant, but by the act of a third party.

Fifth point. As regards the last question, according to the authorities, it is not necessary that any precise amount should be specified in the acknowledgment, if the latter be

clear, and the amount can be ascertained by extrinsic evidence. Here there is certainly an acknowledgment by the plaintiff that 17*l.* plus the defendant's bill are due to the latter, which is sufficient to take the case out of the statute.

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COLTMAN J. With respect to the first question, it has been admitted, that the plaintiff is entitled to recover some portion of his demand. First point.

As to the second question, the plaintiff clearly cannot recover for the two items which are found to be for business done at law or in equity. With regard to the five other items, it is not necessary to say whether the plaintiff would have been entitled to recover them in his capacity of an attorney, for he does not appear to have claimed them in that character. Second point.

On the third question I agree with the rest of the Court, that the plaintiff is not entitled to recover the extra costs. The officers report that the practice is to deliver a bill containing the whole costs; and though it may be contended, on the terms of the statute, that such a step is not necessary, we must look not only at the act, but at the practice which has prevailed upon it. Third point.

With regard to the right to appropriate the 17*l.*, it seems to me that no question can arise, except by a confusion of terms. All the decisions in which this point has been considered have been cases where payments have been made by debtors to creditors; and it has been held that if the party making a payment neglects to direct its application, the right to appropriate it devolves on the party by whom it is received. But here there was no payment at all by the plaintiff to the defendant. Fourth point.

The last question is one of considerable importance, going to the root of the case. It appears to me, though I had some doubt at first, that there is an acknowledgment, which is sufficient to take the defendant's set-off Fifth point.

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out of the statute. I find it firmly established by the decisions, that it is not necessary that the amount of the debt should be specified in the acknowledgment.

With respect to the objection of my Brother *Talfourd*, that this is not a promise to pay, but a demand of a balance claimed by the plaintiff, it is not entitled to any weight. The demand does not relate to the defendant's set-off, but to something beyond. The statute requires an acknowledgment or promise in writing. Here there is an acknowledgment of a debt from which the law will imply a promise; for though the amount is not stated, there is an unequivocal admission of the bill owing to the defendant. It is not the less an acknowledgment of such bill, because the plaintiff makes a claim of a balance due to him.

Second point.

ERSKINE J. With respect to the second question, as the arbitrator has stated that two of the items were for business done, either at law or in equity the plaintiff clearly cannot recover as to them, inasmuch as they are not specified as required by the statute. But with regard to the five other items, it is not stated that they were for business done in the character of an attorney. The arbitrator is silent as to the fact; and as the declaration contains other counts under which those items may be recovered, we cannot infer that they were for business done as an attorney. It is unnecessary, therefore, to consider the decisions, in which it is said that the Courts have disclaimed any other authority than that given to them by the 2 *G.* 2. *c.* 23., for the question that has been argued does not arise.

Third point.

I agree with the rest of the Court that the extra costs are not sufficiently set out. The practice certified to us is undoubtedly the correct practice. The attorney should have delivered a bill of his whole costs in order that the client might see what was charged in respect of

each item, and judge whether it was worth his while to have the bill taxed.

On the fourth question, I am of opinion that a party receiving money on account of a person indebted to him has no right to appropriate it without some direction. Where a party makes a payment, as he has a right to direct its application, when he does not do so, it is to be understood that he confers on the other party the right of appropriation. Here no such inference can arise; for the defendant never had an opportunity of appropriating the sum received by the plaintiff from a third party. Fourth point.

With respect to the issue on the statute of limitations pleaded to the fourth plea, I also agree that the verdict must be entered for the defendant. The first ground, however, taken by the defendant, that cross accounts are not within the statute, cannot be supported, since the case of *Williams* v. *Griffiths* (*a*), recognised in this Court in *Mills* v. *Fowkes.* (*b*) Those cases seem to me to establish the right principle, that the 9 G. 4. c. 14. intended to do away with any inference arising from the existence of mutual accounts, and to require a promise to pay, or an acknowledgment from which a promise may be inferred. I agree that the memorandum by the plaintiff at the foot of his bill is sufficient to take the defendant's set-off out of the statute; for though the amount of the latter's bill is not specified, the arbitrator has found that the plaintiff intended that the defendant's bill should be deducted from his own account. We must, therefore, take it that he intended to give the defendant credit for the whole of his bill, and consequently the verdict on this issue must be entered for the defendant. Fifth point.

(*a*) 5 *Tyrwh.* 748., 2 *Cr. M.* & *R.* 45.

(*b*) 5 *New Cases*, 455., 7 *Scott*, 444.

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The rule, as drawn up on the finding of the Court, was, —

That the verdict be entered for the plaintiff on the first plea, and issue damages, 166*l.* 2*s.* 6*d.*; for the plaintiff on the second plea and issue; for the defendant on the third plea and issue, as to 50*l.*, and for the plaintiff as to the residue; for the defendant on the fourth plea and issue; and for the plaintiff on the fifth plea and issue thereon, as to 118*l.* 4*s.*, and as to the residue, for the defendant.

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In an action by an indorsee against an indorser of a promissory note, the following letter from the plaintiff to the defendant was held to be an insufficient notice of dishonour: — "This is to inform you, that the bill I took of you, 15*l.* 2*s.* 6*d.*, is not took up, and 4*s.* 6*d.* expense; and the money I must pay immediately. My son will be in *London* on *Friday* morning."

DEBT. The first count of the declaration was upon a promissory note for 15*l.* 2*s.* 6*d.* made by one *Benuan*, payable two months after date to the order of *John Norman*, and indorsed by him to the defendant, who indorsed to the plaintiff. The declaration also contained counts for goods sold and delivered, and upon an account stated.

The defendant pleaded to the first count, first, that the note was not duly presented for payment; and, secondly, that he had not due notice of its dishonour. To the second and third counts, he pleaded, thirdly, that he indorsed the note to the plaintiff in satisfaction of the causes of action in those counts respectively, and that he had not due notice of its dishonour when it became due; and to the same counts he pleaded, fourthly, *nunquam indebitatus.*

The plaintiff, in his replication, joined issue on the first, second, and fourth pleas, and took issue upon the allegation of want of notice in the third plea.

At the trial before the secondary in *London*, the plaintiff relied on the following letter, written by him

to the defendant, as containing a sufficient notice of the dishonour of the note: —

"1839. *Stokenchurch*, 5th *August*.

"Sir, — This is to inform you, that the bill I took of you, 15*l.* 2*s.* 6*d.*, is not took up, and 4*s.* 6*d.* expense; and the money I must pay immediately. My son will be in *London* on *Friday* morning.

"*Wm. Messenger.*"

The secondary gave it as his opinion that the notice was insufficient, and directed the jury to find for the defendant on the second and third issues upon that ground. The jury, however, returned a verdict for the plaintiff on all the issues; whereupon the secondary gave the defendant leave to move to enter a verdict on the second and third issues. In *Hilary* term last, *Byles* having moved accordingly to enter a verdict for the defendant on those issues, or for a new trial,

Kelly now shewed cause. If this case had occurred before *Solarte* v. *Palmer* (*a*), there can be no doubt the notice would have been considered sufficient. The word "expense" alone must have intimated to the defendant that the note had been dishonoured by the acceptor, and that it had been again presented to him by a notary. In *Solarte* v. *Palmer*, the notice neither expressed nor implied that the bill had been presented or dishonoured. *Boulton* v. *Welsh* (*b*) is to be regretted as going still further than *Solarte* v. *Palmer*. The decision in that case seems to have been come to with reluctance, on the ground that there was nothing in the notice from which a presentment of the note could be implied. Here that intimation is given, if not expressly, at least so as to be intelligible to every mercan-

(*a*) 1 *New Cases*, 194., 1 *Scott*, 1.

(*b*) 3 *New Cases*, 688. 4 *Scott*, 425.

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tile man. In *Hedger* v. *Steavenson* (*a*), a notice that a bill had become due, and was returned unpaid, with a request that the amount might be remitted, with 1*s.* 6*d.* noting, was held sufficient. So in *Grugeon* v. *Smith* (*b*) a notice that a bill had been "returned — with charges" was considered as conveying that it had been dishonoured. In neither of those cases was there any express intimation that the bill had been presented; but a presentment was implied from the words "1*s.* 6*d.* noting," and "returned — with charges." So here it is impossible to read the notice without seeing that the words "4*s.* 6*d.* expense" necessarily imply a claim made for notarial charges; and that the note had been presented to the party primarily liable upon it, is still more strongly to be inferred from the plaintiff, who is only an indorsee, stating that he must pay the note immediately. In *Strange* v. *Price* (*c*) the notice merely stated the bill had not been paid, but contained nothing to show that it had been presented or dishonoured. There *Coleridge* J., while he held with the rest of the court that the notice was insufficient, said, "The word *returned* certainly does imply that the bill has been presented, and refused payment. So also does the word *dishonoured*, and so does the notification that the bill has come back with notarial charges." Here, as already stated, the word "expense" must be understood as meaning "notarial charges." It is submitted that this case may be distinguished from all the decisions in which the notice has been held insufficient. It is important to commercial transactions that no further difficulties should be thrown in the way of bills and notes. This case shows that ignorant men may have to give notice of the dishonour of such instruments; and it will be requiring such men to do

(*a*) 2 *Mees. & W.* 799.
(*b*) 6 *A. & E.* 499., 2 *N. & P.* 303.
(*c*) 2 *P. & D.* 278.

impossibilities, if it be held that they are bound to give a strictly technical notice.

Talfourd Serjeant, and *Byles*, in support of the rule. It is essential, for the protection of an indorsee, that the notice given him of the dishonour of a bill or note should be sufficient, for otherwise he will be unable to recover over against the prior parties to the instrument. It is laid down in all the books that a notice of dishonour should give a proper description of the bill or note, and should distinctly intimate that it has become due and has been presented, and that the acceptor or maker has failed to pay it. The notice should also demand payment from the party addressed. Here the note is misdescribed as a bill. In *Beauchamp* v. *Cash* (*a*), *Abbott* C. J. held that a notice, stating the bill to have been drawn by the party, when, in fact, he was only an indorsee, was insufficient, and yet every indorsement is in strictness a new drawing of the bill. Where there is a misdescription, the identity of the instrument should at any rate be made out by accessary circumstances. Here the notice does not state who is the maker of the note, neither does it show that the note is due. In *Strange* v. *Price*, *Patteson* J. said, "It ought to appear, by necessary inference, that the bill was due."

Again, this notice contains nothing to import that the note had ever been presented. The words "returned unpaid" were relied on, in *Hedger* v. *Steavenson*, as implying that the bill had been duly presented and dishonoured; but this Court, in *Boulton* v. *Welsh*, thought that the words "returned to me unpaid" consistent with the fact that the note had never been presented to the maker. What is there here to show that the note had ever been out of the plaintiff's possession? It is said that the words "4*s*. 6*d*. expense" bring this case

(*a*) *Dowl. & Ryl. N. P. C.* 3.

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within *Hedger* v. *Steavenson*; but *Parke* J. disclaimed deciding that case on the expression "with 1*s*. 6*d*. noting" there used. In *Grugeon* v. *Smith* the words were "returned—with charges;" but here there are no equivalent expressions. The words "not took up, and 4*s*. 6*d*. expense," may mean that the plaintiff expected some previous holder to take up the note, or it might not have been accepted, (for as it is so described in the notice, it is to be considered as a bill,) and then it would not be taken up. Under either supposition, expenses might have been incurred for postage or otherwise. The word "expense" does not necessarily imply notarial charges; neither does it imply charges incurred by a presentment to the maker of the note; but in order to hold this notice to be good, it is requisite to make both those inferences. Moreover, there is nothing here to shew that payment has been refused. The words "is not paid," in *Strange* v. *Price*, are more definite than the expression "not took up," and yet they were held insufficient. In that case, Lord *Denman* C. J. says, "It is clear that the law now requires express notice of the acceptor's having refused payment, as well as of the party having been called upon to pay." With regard to the latter point, there can be no doubt that a notice of dishonour must state that payment is expected from the party to whom the notice is given. *Tindal* v. *Brown*. (*a*) But here there is nothing to indicate that the plaintiff looked to the defendant for payment of the note. His son might be going to *London*, not to receive the amount from the defendant, but to pay it to the holder of the note. This view is strengthened by the expression, "the money I must pay immediately," which intimates that the defendant himself had not taken up the note, and if so, he was not the party entitled to call for payment.

Cur. adv. vult.

(*a*) 1 *T. R.* 167.

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The judgment of the Court was now delivered by TINDAL C. J.

The short question in this case is, whether the notice of dishonour of the promissory note, on which this action is brought, is sufficient under the authority of the law laid down by the House of Lords in the case of *Solarte* v. *Palmer*. (*a*)

The action was brought by the plaintiff as indorsee of a promissory note against the defendant as indorser; and the notice was by letter from the defendant to the plaintiff in the following terms: — "This is to inform you, that the bill I took of you, 15*l.* 2*s.* 6*d.*, *is not took up, and* 4*s.* 6*d.* *expense*; and the money I must pay immediately. My son will be in *London* on *Friday* morning."

The law laid down by the House of Lords has not been, as indeed it could not be in an inferior court of law, called in question upon the argument of this case; but the endeavour on the part of the plaintiff's counsel has been to distinguish the terms of this letter from those of the letter produced in evidence in *Solarte* v. *Palmer*, and to contend that it conveys sufficient notice of the dishonour of the note, within the authority of cases subsequently decided.

We entirely agree that the rule laid down by the House of Lords is not to be extended, and that any case to be governed by it should fall clearly within its principle; but at the same time nothing can be more inconvenient than, on each particular occasion, to be under the necessity of recurring to nice and subtle distinctions by way of exception from its authority. And we cannot hold the present case to be brought out of the reach of that decision by any sufficient and clear distinction.

(*a*) 1 *New Cases*, 194., 1 *Scott*, 1.

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The cases on which the plaintiff principally relied as authorities in his favour were the following; *Grugeon* v. *Smith* (*a*), in which the letter contained the words, "Your bill has been returned — with charges," and *Hedger* v. *Steavenson* (*b*), in which the words were, "The promissory note payable to your order became due yesterday, and *has been returned unpaid.*"

We are far from saying that those cases may not have been properly decided; for it is difficult to give any other meaning to the terms "returned," and "returned — with charges," than an intimation that the bill had been actually presented, refused payment, and returned to the holder on that account.

But such is not the necessary construction of the present letter. That the note (misdescribed as a bill) has not been taken up, points rather more at an expectation that the party addressed, or some other prior party to the note, had engaged to take it up, than at a regular presentment at the maker's and a refusal; and the expression, "4*s.* 6*d.* expense," falls very short of that of "returned — with charges," in *Grugeon* v. *Smith.*

On the whole, we think it safer to hold ourselves bound by the decision in *Solarte* v. *Palmer*, followed by that of *Boulton* v. *Welsh* (*c*) and *Strange* v. *Price.* (*d*)

The rule, therefore, must be made absolute for a new trial.

Rule absolute accordingly.

(*a*) 6 *A. & E.* 499., 2 *N. & P.* 303.

(*b*) 2 *Mee. & W.* 799.

(*c*) 3 *New Cases*, 688., 4 *Scott*, 425.

(*d*) 2 *P. & D.* 278.

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BUXTON *v.* JONES.

April 22.

ASSUMPSIT on a bill of exchange drawn 10th of *December* 1839, by *Charles Simpson* upon *Frederick Epworth* for 20*l.*, payable two months after date to the order of the drawer, by him indorsed to the defendant, by the defendant indorsed to the plaintiff, presented to the drawee, and unpaid; whereof the defendant had notice. The declaration contained counts for money lent, and on an account stated.

Plea, to the first count, non-presentment; to second and third counts, *non assumpsit.*

At the trial before Lord *Denman* C. J. at the *Warwick* Spring assizes, 1840, the plaintiff, in order to prove the affirmative of the first issue, produced the bill of exchange, which purported to be addressed to the drawee, by the description of Mr. *Frederick Epworth*, No. 38. *Minto Street*, *Baal-zephon Street*, *Bermondsey*, and appeared to be accepted by him generally; and proved that, at the request of his attorney's clerk, one *Williams* went at nine in the morning of the 13th of *February* (on which day the bill became due) to No. 38. *Minto Street*, and that seeing a woman come out of a passage belonging to the house (which was a huckster's shop) with a child in her arms, he asked her whether *Epworth* was there, and was informed that *Epworth* was gone. He then left with this woman a card containing notice of the bill's being due, and went away without making any further inquiry. *Goulburn*, Serjt. applied for a nonsuit, on the ground that the evidence of the presentment was insufficient. The noble and learned Judge, however, said that he thought that evidence ought to be given on the part of the defendant. Upon which Card the keeper

A bill of exchange was presented for payment at the door of the house where the drawee was described as living, to a lodger who was coming from the passage of the house into the street. The drawee had removed to another residence, known to the occupier of the house, but not to the lodger; and it was not shewn that he had left funds for payment. Held, that the presentment was sufficient to maintain the affirmative of an issue raised on the due presentment of the bill in an action against an indorser.

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of the shop at No. 38. and his wife were called. (*a*) From their testimony it appeared that the wife was at home during the whole of the 13th of *February*, and the husband for a great part of the day; and that they had seen and heard nothing of *Williams* or his message; that *Epworth* before the 13th of *February*, being in the police force, had removed from *Bermondsey* to *Enfield*; and that a woman who had a child was a lodger in the house.

No evidence was offered in support of the money counts.

The noble and learned Judge left it to the jury to say, whether under the circumstances, there had been a legal presentment for payment.

The jury found a general verdict for the plaintiff; damages 21*l.* 2*s.* 6*d.*

First objection: Matter of law submitted to the jury. (*b*)

Goulburn Serjt. now moved for a new trial, on the ground of misdirection. In *Bateman* v. *Joseph* (*c*), the rule is distinctly laid down thus: "Whether due notice has been given of the dishonour of a bill, all the circumstances necessary for the giving of such notice being known is a question of law; but whether the holder has used due diligence to discover the place of residence of the person to whom the notice is to be given is a question of fact for the jury." (*d*) Here no question of

(*a*) The defendant, by going into evidence, took his chance of bettering his case. The Court therefore was not called upon to give any opinion upon the question, whether the proof given by the plaintiff was sufficient evidence of presentment to go to the jury.

(*b*) No judgment was pronounced on this point. The Court probably considered, that if the noble and learned Judge had stated the law to the jury, the result would have been the same.

(*c*) 12 *East*, 434.

(*d*) The importance of preserving this distinction appears from the consideration that in this case of *Buxton* v. *Jones* the jury are supposed to have drawn an important inference from a particular fact, their attention not having been called either to the fact or to the in-

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due diligence to discover the place of residence arose. No question was made as to the facts attending the presentment of the bill for payment. The circumstances, therefore, under which the presentment for payment was made being known, the noble and learned Judge ought to have told the jury whether, in his opinion, a sufficient presentment had been proved.

Second objection: Insufficient presentment.

The presentment in this case was insufficient. The defendant, as indorser, is only liable upon the default of the drawee. *Cheek* v. *Roper* (*a*) was an action against the drawer of a bill which, it was alleged, the drawee had refused to accept. The evidence of presentment for acceptance was, that the bill being addressed to *J. Hammond*, tanner, *Bristol*, the witness went to *Hammond*'s house, and offered the bill to some person in the tan-yard, who refused to accept it. (*b*) Lord *Ellenborough* held, that as the indorser was liable only upon the default of the drawee, evidence must be given of an application to the party first liable, and that the evidence shewed no demand on *Hammond*, and was therefore insufficient. In *Collins* v. *Butler* (*c*) it was held, that in order to charge the indorser of a promissory note, it was not sufficient to prove that the maker had shut up his house, without going on to shew that an inquiry had been made after the maker, or that it had been attempted to find him out. Here, if the messenger, *Williams*, had taken the trouble to inquire where *Epworth* was, there would have been no difficulty in finding him. In *Hine* v. *Allely* (*d*), the holder went to the residence

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ference. For any thing which appears, the jury may have determined the presentment to be sufficient, on grounds wholly unconnected with the circumstance of the woman's being either lodger or inmate.

(*a*) 5 *Esp. N. P. C.* 175.

(*b*) That is, as appears from the case, he refused to *receive* the bill from the person who presented it.

(*c*) 2 *Stra.* 1087.

(*d*) 4 *B. & Adol.* 624., 1 *Nev. & Mann.* 433.

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of the drawee as indicated by the bill. Finding the house closed, he inquired for the drawee in the neighbourhood. That was held to be a sufficient presentment; but here no attempt was made to ascertain the residence of the drawer, after the unsatisfactory statement made by a person who must be taken to be a mere stranger. He also referred to 1 *Lord Raymond*, 745. (*a*), and *Hardy* v. *Woodroofe*. (*b*)

TINDAL C. J. This bill, drawn upon *Epworth*, is addressed to him as Mr. *Frederick Epworth*, 38. *Minto Street*, *Baal-zephon Street*, *Bermondsey*. The drawee accepts *generally*, thereby adopting the description of his residence as stated at the foot of the bill. When the bill becomes due, a messenger is sent to demand payment. The messenger inquires for *Epworth* of a person who must be taken to be an inmate (*c*); and from that person he receives an answer, which is true. It was not necessary to present the bill to *Epworth* personally. If he chose to remove from the house pointed out by the bill as his place of residence, he was bound to leave sufficient funds on the premises. In *Hine* v. *Allely* (*d*) the holder went to the place at which the bill was addressed, and found the house shut up. This was held to be sufficient evidence of presentment.

(*a*) *Anonymous*.

(*b*) 2 *Stark. N. P. C.* 619.

(*c*) As to "inmate," see the settlement cases, of *Rex* v. *North Collingham*, 1 *B. & Cress.* 578., 2 *Dowl. & Ryl.* 743.; *Rex* v. *Great Bolton*, 8 *B. & Cress.* 71., 2 *Mann. & Ryl.* 227.; *Rex* v. *Ditcheat*, 9 *B. & Cress.* 176., 4 *Mann. & Ryl.* 151.: — cases of burglary, 2 *Russell on Crimes*, 937.; 1 *Deac. Crown Law*, 185, 186.; 2 *East, P. C.* 499, 500. 505.; 1 *Leach's Crown Law*, 90. 237. 427.: — cases of parliamentary elections, *Phillipp's Case, Alcock's Registration Cases*, 21.; *Duigunan's Case*, *ib.* 114.; and see *Termes de la Ley*, tit. *Inmate*, 426.; *Kitchen on Courts*, tit. *Inmates*, 92., *French* edition, 45 *b.*; *Com. Dig.* tit. *Justice of the Peace* (B 85.); *Lee* v. *Gansel*, *Cowper*, 8. It would rather seem that every lodger is an inmate (but see *Kitch. on Courts*, *ubi suprà*), though not *e converso*.

(*d*) *Suprà*, 85.

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BOSANQUET J. I am of the same opinion. I think the woman cannot be considered as a stranger. The jury might infer that she was an inmate.

ERSKINE J. (*a*) concurred.

Rule refused.

(*a*) *Coltman* J. had not returned from the *Somerset* assizes, and *Maule* J. was the judge at chambers.

LONG *v.* BILKE.

April 28.

Whether the service of a declaration in ejectment upon one of several subtenants of a lessee, followed up by judgment against the casual ejector, and executed against that subtenant, is evidence of an election on the part of the lessor, to avail himself of a clause of re-entry contained in the lease, *quære.*

DEBT for uses and occupation. *Pleas: Nunquam indebitata*, and Statute of Limitations.

The action was brought to recover rent at the rate of 50*l.* per annum, from *Michaelmas* 1829, when the last rent was paid, to *Michaelmas* 1836.

The plaintiff was seised in fee under a conveyance of 9*th June* 1814, from *Clarke*, mortgagee in fee of *John Bowater*, at which time the equity of redemption had descended from *John*, the mortgagor, to *Edward Bowater*. The premises were occupied, during the period in question, by persons holding as under-tenants to the defendant. In *June* 1796 a lease of the premises, with the appurtenances, was granted to *George Bowater* for forty years, expiring at *Michaelmas* 1836, at 50*l.* per annum, under a power of attorney from *John Bowater* the mortgagor, but which lease was not conformable to the power, as it contained no proviso for re-entry. *George Bowater* assigned to *White*, who underlet to *Cormack*. *Cormack* underlet to *Wilson*, and *Wilson* to *Farlow*, the occupying tenant. *White* assigned the original lease to *H. Bunn*. *H. Bunn* by his will bequeathed to *J. Bilke* and *John Bunn*, in trust for the two daughters of *H. Bunn*, the testator, namely, the defendant, and Mrs. *Cole*, since deceased. *John Bunn*, who survived *J.*

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Bilke, made *Worthington* his executor, and died, having received the improved rent, for which he gave receipts on account of the legatees of *H. Bunn*, but from 1829 neglected to pay the 50*l.* a-year to the plaintiff. After the death of *John Bunn*, the improved rent was received by the defendant, whose agent gave receipts as for rent due to the legatees of *Henry Bunn*. The defence set up was, that the plaintiff was not seised of the *whole* reversion. No other person claimed any title to any part of the rent. Until 1829 the rent of 50*l.* was paid without dispute. The plaintiff contended that the lease was void as against him, the mortgagee. He, however, did not seek to recover more than the 50*l.* per annum; but insisting upon his right to meet any technical objection by similar means, he put in a copy of a judgment against the casual ejector in an ejectment which had been brought in 1831 on the demise of Mr. *Bilke* the now plaintiff, and shewed that upon this judgment an *habere facias possessionem* had been executed against *Madkins*, who held a part of the demised premises.

The objections were, first, that the plaintiff was not entitled to sue, because she was seised only of part of the demised premises, a small portion of the property demised, coming under the word "appurtenances" not having been included in the conveyance to the plaintiff.

Secondly, that there was no legal privity between the plaintiff and the defendant to sustain this action. It was said that the action should have been brought against *Worthington*.

Thirdly, that there was no such occupation as would charge the defendants, and that the remedy, if any, was on the lease.

Fourthly, that there was an outstanding term; but this objection was abandoned. A verdict was found for the plaintiff, debt 250*l.*, damages 1*s.*, and costs 40*s.*

Talfourd, Serjt., having obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved.

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Wilde, S. G. now shewed cause. This is an action by the owner of the fee against a person who has occupied, by receiving rents of her sub-tenants. The lease by the mortgagor could not bind the mortgagee; nor was it indeed binding as against the mortgagor, as the power of attorney, under which it was executed, required the insertion of a proviso for re-entry.

The defendant was a sufficient occupier. The persons in possession could not dispute the defendant's title. There was no privity between *Farlow*, the actual occupier, and the plaintiff; *Webb* v. *Russell*. (*a*) By the bringing of the ejectment the lease was determined. It is admitted that although the words are such as to create a *cesser* of the term, yet the lease cannot be avoided by the lessee. But when the lease is not a freehold lease, no entry is necessary to enable the lessor to avoid it. The judgment in ejectment was proved in order to shew, if necessary, that the lease had been avoided, and that ejectment was followed by a judgment and execution against *Madkins*, who was in possession of part of the premises comprised in the lease.

He then adverted to the contents of the affidavits, the effect of which will be found in the judgment.

Stephen, Serjt., on the same side. The receipt was given as for the legatees of *H. Bunn*, deceased. This was a *designatio personæ* of the defendant and her sister, from whom alone the agent derived the power to receive the rent. The receipts given by the plaintiff were refused to be produced. Mrs. *Long* claimed from a mortgagee, whose title commenced in 1771. It makes no difference whether the occupation was actual or constructive. In *Bull* v. *Sibbs* (*b*), it was held, that if *A.* agreed to let lands to *B.*, who permits *C.* to occupy, *A.* may recover in an action for use and occupation

(*a*) 3 *T. R.* 393. (*b*) 8 *T. R.* 327.

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against *B.* So, where a party who had agreed to take a lease procured attornments (*a*) from some of the tenants, and received rent from others, he was held liable for use and occupation; *Neal* v. *Swind* or *Sweeney* (*b*). An action could not have been maintained for money had and received, because there was no privity between the plaintiff and the under-tenants, who, if they had been sued by the plaintiff, might have insisted that they had been holding adversely. The action would be local, if an action could be brought against the assignees of the term; and perhaps debt for use and occupation would not lie. The plaintiff denies that the payments were made under the lease — they were made to him as owner of a legal fee. [*Tindal* C. J. Do you not take subject to the lease?] The plaintiff takes subject to the lease, *taliter, qualiter*. The plaintiff insists, first, that the defendant was no party to the deed of 1814. Secondly, that there can be no estoppel where the title appears. The plaintiff takes subject to that which is nothing. An estoppel must be mutual. (*c*) The defendant relies on *Doe dem. Courtail* v. *Thomas* (*d*); but the plaintiff here does not claim under the lessor after the lease. The plaintiff could not sue on the lease. It is immaterial whether any lease existed or not; *Doe dem. Martin* v. *Watts*. (*e*) The payments made under the lease, though void, and incapable of confirmation, were held to create a new tenancy under the remainderman. The lease containing a clause for a cesser of the term, an end was put to the lease by the ejectment, *Co. Litt.* 313 *b*; and it is immaterial that part only was recovered, *Co. Litt.* 317 *b* (*g*) No demand is necessary except in cases where an entry is necessary; *Rede* v.

(*a*) *Vide post*, 128.

(*b*) 2 *Tyrwh.* 464., 2 *Cro. & Jerv.* 377.

(*c*) *Co. Litt.* 352 *a.*; *James* v. *Landon*, *Cro. El.* 37.

(*d*) 9 *B. & Cress.* 288., 4 *M. & Ryl.* 218.

(*e*) 7 *T. R.* 83.

(*g*) Where it is said, that "an attornment good for par-

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Farr. (*a*) The exercise of the option to determine the lease is sufficiently declared by the act of bringing the ejectment, whether there be a recovery in that ejectment or not. Here the ejectment was defended by the landlords, except as to the part which was in the possession of *Madkins*. *John Bunn* defended for part as landlord. The affidavit filed by the defendant states that *Madkins* was a stranger. The affidavits on the part of the plaintiff shew that *Madkins* was in possession of part of the premises, conveyed to the plaintiff and comprised in the lease.

Talfourd, Serjt. in support of the rule. The question is, whether leaving the judgment out of the case, there was enough to entitle the plaintiff to a verdict. The lease was vested in *J. Bunn* as the executor. The defendant had only an equitable estate. *Bunn* would be the party liable under the lease; the plaintiff cannot go against the *intermediate* party. The constructive possession follows the legal title. The plaintiff is estopped from saying that the lease is not valid; she received the rent reserved under it. The plaintiff distrained under the lease. [*Wilde* S. G. But that distress was resisted.] There has not been a proper demand of rent to create a forfeiture. *Arnsby* v. *Woodward* (*b*), *Doe dem. Bryan* v. *Bancks*. (*c*) It was therefore necessary to shew something tantamount to re-entry.

Richards R. V., on the same side. The plaintiff could not treat the lease as void. Although an *habere facias* issued no part of the premises was taken possession of under that writ.

Cur. adv. vult.

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cel is good for the whole; for seeing he hath attorned for that it cannot be void, and good it cannot be, unless it be for the whole." And see *post*, 128 *n*.

(*a*) 6 *Maule & Selw.* 121.
(*b*) 6 *B. & Cress.* 519. 9 *Dowl. & Ryl.* 536.
(*c*) 4 *B. & Ald.* 401.

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TINDAL C. J. now delivered the judgment of the Court.

This was an action for use and occupation, to which the defendant pleaded the general issue and the Statute of Limitations.

In the course of the trial it appeared that a lease had been granted of the premises, in respect of which the action was brought (*inter alia*) to one *George Bowater*. The legal interest in the term granted by this lease had afterwards passed to one *Bunn*, and on his death to *Worthington*, his personal representative; and it was contended, as one ground of defence, that the action, if maintainable at all, ought to have been brought against *Worthington*, and not against the present defendant.

On behalf of the plaintiff, it was answered, that the lease was void, or at least voidable at the election of the plaintiff; and in order to prove that she had elected to avoid it, a judgment in ejectment against the casual ejector, signed in the year 1831, on the joint and several demises of the plaintiff and one *Jabez Kidd*, was produced; and it was further proved that the rule *nisi* for judgment was served on all the tenants in possession or the premises to which the present action relates.

The counsel for the defendant apprehending that the judgment precluded him from some of the grounds of defence on which he meant to rely before the jury, agreed to leave the case upon the facts proved to the decision of the Court, but subsequently obtained a rule, calling on the plaintiff and her attorney to shew cause why a new trial should not be granted, and the costs of the former trial paid by the plaintiff's attorney, on the ground that the giving of the judgment on evidence was a surprise upon the defendant, and an imposition on the Court.

The material facts relating to this judgment, as they appear upon the affidavits, are as follows: —

The ejectment was brought in *May* 1831, and served

on the tenants of all the premises comprised in the lease, one of them (named *Madkins*) being also the tenant of a wharf which he held under a different demise. The tenants did not appear to defend, but *Bunn* appeared and defended, as landlord for the lands in the occupation of all the tenants except *Madkins*.

Judgment was signed against the casual ejector in *July* 1831.

On the 2d *November* following, the plaintiff was ruled on the part of *Bunn* to reply, and on the 9th judgment of *non-pros.* was signed; and the costs having been taxed, they were paid by one of the clerks of the plaintiff's attorney, the money having been furnished to the clerk for that express purpose by the lessor of the plaintiff. *Madkins* gave up to the lessor of the plaintiff such part of the premises contained in the lease as he was in possession of, but having refused to deliver up the wharf, a writ of execution was sued out in *August* 1831 upon the judgment signed against the casual ejector, under which *Madkins* was turned out of possession of the wharf.

After the present action was brought, the roll of the judgment in ejectment was carried in, in order that a copy of it might be given in evidence on the trial.

But it is sworn by the attorney, and herein he is confirmed by his clerk, that the original judgment paper was found accidentally in searching for another paper shortly before the trial, and that the roll was carried in by the advice of counsel; and the attorney swears, that neither at the time of finding the judgment paper, nor at the time of the trial, had he any recollection of the particular circumstances of the judgment, or that the action had been *non-prossed* as far as regarded *Bunn*, the proceedings in the action of ejectment having been managed by a clerk not now in his employ. The clerk who paid the costs of the *non-pros.* has also sworn to the same effect.

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On the argument it could not be contended that an improper use had not been made of the judgment; but it was urged for the plaintiff, that the ejectment was not a necessary part of the plaintiff's case, and that if the evidence respecting the ejectment were struck out, the plaintiff had still proved enough to entitle her to a verdict, and that the matter having been referred by consent to the judgment of the Court, the plaintiff was entitled to judgment, if the Court were of opinion a sufficient case was made out.

We think, however, that the consent of the defendant having proceeded upon the faith of the judgment in ejectment having been submitted to by all parties interested, she ought not to be bound by it, and that she is entitled to have her case submitted to a jury free from the effect of that judgment. The rule for a new trial will therefore be absolute; but as the defendant has not established, by any distinct proof, that the attorney for the plaintiff, when he gave the judgment in evidence, was aware of the true facts of the case as they now appear, we do not think he ought to be ordered to pay the costs. The rule for a new trial will, therefore, be made absolute without costs on either side.

Rule absolute.

Thursday, April 30.

PALMER *v.* REIFFENSTEIN.

Money is paid into court by a defendant, who dies before verdict or interlocutory judgment; whereby the suit abates. The money can be paid out of Court only to the personal representative of the defendant. An application on the part of his attorney will not be entertained.

THIS was an action of debt commenced by bailable process, 28th *February* 1838, for goods sold and delivered, and upon an account stated, brought to recover 249*l.* 13*s.* 3½*d.*

The defendant pleaded *nunquam indebitatus*, and a set-off.

The replication denied the matter of set-off.

The issue was delivered 26th *April*, 1838, with notice of trial for the second sittings in *Easter* term at *Guildhall*. On the 9th of *May*, 1838, a rule was obtained for a writ in the nature of a *mandamus* or commission to issue for the examination of witnesses, and to postpone the trial of the cause until after the return.

A writ in the nature of a *mandamus* accordingly issued, directed to the Honourable *Jonathan Sewell*, chief justice, and *Edward Bowen*, *Eleazar Bedard*, and *Philippe Panet*, Esqs., the judges, of the King's Bench at *Quebec*, in the province of *Lower Canada*. In *May* 1839 this writ was forwarded to the defendant at *Quebec*, with instructions to be delivered to *G. O. Stewart*, Esq., the defendant's counsel at *Quebec*, by whom the witnesses were to be examined. On the 8th of *December*, 1838, the writ was received by the defendant's attorneys in *England* from Mr. *Stewart*, with a letter, stating that the writ could not be proceeded with in consequence of Mr. *Sewell*'s having resigned his office, the commission being addressed to all the judges collectively. A fresh writ issued, which, after being executed, was received in *London* in *September* 1839. Before the return of the second writ, the plaintiff obtained a rule *nisi* for discharging the rule for the writ. This rule was discharged on the terms of the defendant's bringing 100*l.* into court to abide the further order of the Court within a certain time limited by the rule. The 100*l.* was paid into court accordingly. Notice of trial was continued for the adjourned sittings after *Michaelmas* term, 1839. On the 3d of *December*, the plaintiff having obtained copies of the depositions, countermanded the notice of trial. Early in this term a rule was obtained for judgment as in the case of a nonsuit, but before this rule came on the defendant died.

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Storks Serjt. now moved for a rule to shew cause why the 100*l.* paid into Court should not be paid out of Court to the defendant's attorney. (*a*)

TINDAL C. J. The authority of the attorney is determined by the death of his client. (*b*) This application can only be made on behalf of the personal representatives of the party who paid in the money. The executor or administrator of the defendant may choose to employ another attorney; and if we were to grant this rule, there may be several applications to the court in respect of the same fund.

The other Judges concurred.

Rule refused. (*c*)

(*a*) It did not appear that the attorney had paid the 100*l.* out of his own moneys.

(*b*) And see *Co. Litt.* 52 *b.*, 2 *Roll. Abr.* tit. *Feffments*, (S) 1.; *Roby* v. *Twelves*, *Style's Rep.* 424.; *Shipman* v. *Thompson*, *Willes*, 105.; *Wynne* v. *Thomas*, *ibid.*, 563.; *Tate* v. *Hilbert*, 2 *Ves.* jun. 118.; *Watson* v. *King*, 4 *Campb.* 272., 1 *Starkie*, *N. P. C.* 121.; 1 *Bac. Abr.* tit. *Authority*, (E).

After a verdict for the plaintiff, and pending a rule for a new trial, the plaintiff dies. No cause can be shewn against the rule until there is a personal representative.

(*c*) In *Shoman* v. *Allen*, tried before *Bosanquet* J. at the *Northampton* Summer assizes, 1838, a verdict was found for the plaintiff. The defendant obtained a rule in this Court for a new trial. On *Goulburn*, Serjt. appearing to shew cause against the rule, *Adams*, Serjt. produced an affidavit, by which it appeared that the plaintiff had died pending the rule, and objected that *Goulburn*, Serjt. could not be heard, no will having been proved, or administration taken out. *Goulburn*, Serjt. suggested that judgment might be entered up *nunc pro tunc*, and contended that, at all events, he might be heard on the part of the plaintiff's attorney, who had a lien on the verdict for his costs, and cited *Tidd's Practice*, 8th ed. 965.

Per Curiam. The death of the party is the revocation of the authority to the attorney. *Non constat*, that the administrator, when appointed, may think fit to go on with the cause. Administration must first be taken out, and then the cause may proceed.

On a subsequent day *Goulburn* Serjt. produced an affidavit, which stated that administration had been granted. The case was argued, and the rule discharged. *Ex relatione Goulburn, Servientis.*

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MIDDLETON *v.* CHAMBERS.

May 6.

ASSUMPSIT on a bill of exchange for 1000*l.*, dated the 1st of *August* 1831, drawn by one *Henry Wilton* upon and accepted by the defendant, payable to the order of *Wilton* one month after date, and by *Wilton* indorsed to the plaintiff.

Plea, that long before and at the time of making the bill of exchange in the first count mentioned, the said *H. Wilton*, in the bill and declaration mentioned, acted and practised as and carried on business as an attorney in one of his Majesty's courts at *Westminster*, and also as a solicitor in the court of Chancery, having been theretofore, to wit, in *Easter* term, that is to say, on the 20th of *April* 1810, duly admitted, sworn, and inrolled in that behalf, and afterwards, and after the expiration of more than one year from such admission, swearing, and enrolment respectively, and not at any time before, to wit, on the 13th of *April* 1813, delivered into the com-

In an action against the acceptor of a bill of exchange indorsed to the plaintiff after it became due, the defendant pleaded that the consideration for the bill was business done for him by one *W.*, as his attorney and solicitor, and alleged that *W.* in 1810 was admitted an attorney of the King's Bench and a solicitor in Chancery, but took out no certificate till 1813; that from that time he practised and renewed his certificate until 1819, when he took out no certificate for one year and upwards; that he was re-admitted in the King's Bench in 1823, but neglected for more than a year to obtain a certificate; and that at the time the business in question was done, he had not been re-admitted in any of the courts of law, except as aforesaid. The replication stated, that in 1826 *W.* was admitted an attorney of the Common Pleas, and was re-admitted in Chancery, and regularly took out his certificate for that and the four following years, and that the business, for which the bill of exchange was given, was transacted during those five years. The rejoinder alleged, that the admission in the Common Pleas was by virtue of a contract inrolled in the King's Bench, and under which *W.* had been admitted in that Court in 1810, and re-admitted in 1823; and that he "was so admitted in the said Court of Common Pleas, without payment of any further duty in that behalf, according to the form of the statute in that behalf." Held, on demurrer to the rejoinder, that the admission in this Court must be considered as an original admission, and that the non-payment of the stamp duty at the time did not render the admission void, although it may have subjected the party to penalties, and, consequently, that he might maintain an action for his fees, and might, at any time, give a good title to an indorsee of a bill accepted upon that consideration.

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missioners appointed in that behalf a paper or note in writing containing the name and usual place of residence of the said *H. Wilton*, and became and was entitled to a certificate as an attorney, according to the form of the statute in that case made and provided; which certificate the commissioners caused to be issued according to the form of the said statute, and the same was so issued, and the said *H. Wilton* then received the same, and the same was duly entered according to the form of the said statute, and the said *H. Wilton* carried on business and practised as an attorney and solicitor as aforesaid; and thereupon afterwards, the said *H. Wilton* having been so admitted, sworn, and inrolled, did neglect to obtain such certificate as aforesaid, according to the form of the statute in that case made and provided, for the space of one whole year and upwards, that is to say, for the space of three years, and was incapable of practising as aforesaid in his own name or in the name of any other person in any of the said courts by virtue of his aforesaid admission or otherwise; and the said admission, entry, and inrolment of the said *H. Wilton* became and were thenceforth null and void; and thereupon afterwards, to wit, in *Trinity* term, 1823, by an order of the court of our Lord the King, before the King himself, the said *H. Wilton* was re-admitted an attorney of the said court, and thereupon afterwards, and more than one year after such re-admission as last aforesaid, delivered to the said commissioners such paper or note in writing as aforesaid, whereupon the said commissioners caused to be issued such certificate as aforesaid, according to the form of the said statute, and the same was issued accordingly, and the said *H. Wilton* then received the same; but the said paper or note in writing was not delivered to the said commissioners, neither was the said last-mentioned certificate issued as aforesaid at any time within one year after such re-admission as

aforesaid, or within one year after any re-admission or admission of the said *H. Wilton*, as such attorney or solicitor in any other of his Majesty's courts at *Westminster*, but a long time, to wit, one year more than that time; and at the time of such re-admission the said *H. Wilton* was not an admitted attorney of any of his Majesty's courts at *Westminster*, capable of practising as such attorney either in his own name or in the name of any other person. And the defendant further saith, that before or at the time of doing the work and business as hereinafter mentioned, the said *H. Wilton* had not been re-admitted in any of his Majesty's courts of law at *Westminster* except as aforesaid. And the defendant further says, that after such last-mentioned re-admission, and after the issuing of the said last-mentioned certificate, and before the making of the said bill of exchange in the declaration mentioned, the said *H. Wilton* was retained and employed by the defendant to solicit, prosecute, and defend divers suits, causes, and businesses for the defendant in His said Majesty's courts at *Westminster* as his attorney and solicitor, and in his own name as such attorney and solicitor, and did prosecute, solicit, and defend the same as such attorney and solicitor; and by reason thereof the defendant became and was indebted to the said *H. Wilton* in divers large sums of money, amounting in the whole to a large sum, to wit, to the sum of 10,000*l.*, as and for the costs and charges of the said *H. Wilton* as such attorney and solicitor as aforesaid; and being so indebted, the said *H. Wilton*, in order to secure to the said *H. Wilton* the re-payment of part of the said sum wherein the defendant was so indebted as aforesaid, made and drew the said bill of exchange in the first count mentioned; and the defendant then accepted the same, in order to secure such payment to the said *H. Wilton*, and on no other account and for no other consideration

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whatsoever. And the defendant further says, that from the time of making the said bill of exchange until the time when the same became due and payable according to the tenor and effect thereof, the said bill of exchange remained and continued in the hands and possession of the said *H. Wilton*, and was afterwards, and after the same became and was over due, indorsed by the said *H. Wilton* to the plaintiff as in the declaration mentioned. Verification.

Replication. That the said *H. Wilton* did not practise as an attorney or solicitor during any part of the time between the time of his being re-admitted an attorney of the court of our Lord the King before the King himself in *Trinity* term, 1823, as in the said plea alleged, and the time of the said *H. Wilton* receiving the certificate in the said plea lastly mentioned, and entering the same with the proper officer of the said court, to wit, on the 20th of *January* 1826. And the plaintiff further says, that after the issuing of the certificate in the said plea lastly above mentioned, and before the time of the said *H. Wilton*'s soliciting, prosecuting, and defending the said suits, causes, and businesses in the said plea mentioned for the defendant, or any of them, to wit, in *Hilary* term, 1826, the said *H. Wilton* was sworn, admitted, and inrolled an attorney of the said court of Common Pleas at *Westminster*, pursuant to the statute in that behalf made and provided, and was and continued to be an attorney of the said court, so sworn, admitted, and inrolled as aforesaid, for a long time, to wit, for the space of five years then next following. And the plaintiff further says, that the said *H. Wilton* having originally been admitted a solicitor of the high court of Chancery, to wit, on the 5th of *June* 1810, after the issuing of the said certificate in the said plea lastly above mentioned, and before the time of the said *H. Wilton*'s soliciting, prosecuting, and defending the suits, causes, and businesses

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in the said plea mentioned for the defendant, or any of them, to wit, in *Michaelmas* term, 1826, he the said *H. Wilton*, by an order of the court of Chancery, was re-admitted and inrolled a solicitor of the high court of Chancery, pursuant to the statute in that case made and provided, and was and continued to be a solicitor of the same court, sworn, admitted, and inrolled as aforesaid, for a long time, to wit, for the space of five years then next following. And the plaintiff further says, that within a year after the said *H. Wilton* was sworn, admitted, and enrolled to be an attorney of the said court of Common Pleas at *Westminster* as aforesaid, and within a year from the time of the issuing of the said certificate in the said plea lastly above mentioned, and before the time of the said *H. Wilton*'s soliciting, prosecuting, and defending the suits, causes, and businesses in the said plea mentioned for the defendant, or any of them, to wit, on the 23d of *March* 1826, he, the said *H. Wilton*, delivered in to the commissioners of the stamp duties a note in writing containing the name and usual place of residence of him the said *H. Wilton*, pursuant to the statute in that behalf made and provided, and then paid the duties in that behalf required, according to the place of his residence, and obtained such certificate as by law required in that behalf, the same certificate being then issued by the said commissioners according to the statute in that behalf made and provided; and the said *H. Wilton* then caused the said certificate to be entered in the said court of Common Pleas with the proper officer in that behalf, according to the statute in that behalf made and provided. And the plaintiff further says, that the said *H. Wilton*, after the issuing of the last-mentioned certificate, and between the 15th of *November* and the 16th of *December* in each of the several years 1826, 1827, 1828, 1829, and 1830, to wit, on the 1st day of *December* in each of those

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years respectively, delivered into the commissioners of stamp duties a note in writing, containing the name and usual place of residence of him the said *H. Wilton*, pursuant to the statute in that behalf made and provided, and then paid the duties in that behalf required, according to the place of his residence, and obtained such certificate as by law required in that behalf, the same certificate being then issued by the said commissioners according to the form of the statute in that behalf made and provided; which five last-mentioned certificates he, the said *H. Wilton*, to wit, on the 1st day of *December* in each of the years 1826, 1827, 1828, 1829, and 1830, caused to be respectively entered, and the same were then respectively entered in one of the courts wherein he, the said *H. Wilton*, was at the respective times of entering the same as aforesaid, sworn, admitted, and inrolled an attorney as aforesaid, to wit, the said court of the Lord the King before the King himself and the said court of Common Pleas, and with the proper officer in that behalf, according to the statute in that behalf made and provided, and the first of which five last-mentioned certificates was obtained within one year after the issuing of the said certificate of the 23d of *March* 1826. And the plaintiff further says, that the suits, causes, and businesses which the said *H. Wilton* was employed and retained by the defendant to solicit, prosecute, and defend for the defendant, and in respect whereof the said bill of exchange was drawn, and every part thereof, were solicited, prosecuted, and defended by the said *H. Wilton* for the defendant in the said courts of King's Bench, Common Pleas, and Chancery, during the time he the said *H. Wilton* was such attorney and solicitor as aforesaid, admitted and inrolled as aforesaid, and having such certificates as aforesaid entered as aforesaid, and whilst he was capable of practising as such attorney and solicitor as aforesaid, that is

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to say, on the 1st of *January* 1826, and on divers other days and times between that day and the 31st of *December* 1831. And the plaintiff further says, that no business in the said suits or causes, or any other business in respect of which the said bill was so drawn, was done or performed by the said *H. Wilton* without obtaining a certificate as required by law in that behalf, or without entering the same in one of the courts wherein the said *H. Wilton* was admitted, sworn, or inrolled as aforesaid. Verification.

Rejoinder. That the said *H. Wilton* was heretofore, to wit, in *Hilary* term 1826, admitted an attorney in the court of Common Pleas at *Westminster*, as in the replication mentioned, by virtue of a certain contract inrolled in the court of our Lord the King before the King himself, and registered with the proper officer in that behalf, and a service under the same, and under which the said *H. Wilton* had been admitted, sworn, and inrolled in *Easter* term, 1810, as in the said plea in that behalf mentioned, and was re-admitted in *Trinity* term, 1823, as in the said plea mentioned. And the said *H. Wilton* was so admitted in the said court of Common Pleas, *without payment of any further duty in that behalf, according to the form of the statute in that behalf.* And the defendant further saith, that at the time of such admission as an attorney in the said court of Common Pleas, the said *H. Wilton* was not an admitted attorney on the Rolls of, and authorised to practise as such in, any of His Majesty's courts at *Westminster*. And the defendant further says, that when he the said *H. Wilton* was so re-admitted and inrolled a solicitor of the court of Chancery, as in the replication mentioned, he was not an admitted attorney on the rolls of, and authorised to practise as such in, any of His Majesty's courts at *Westminster*, except as aforesaid. Verification.

The plaintiff demurred specially to the rejoinder, as-

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signing for causes, that the rejoinder attempts to put in issue, to be tried by the country, inference and matter of law, viz. whether the said *H. Wilton*, having been re-admitted an attorney of the court of King's Bench in 1823, as stated in the said plea, and having omitted to obtain his certificate for more than a year from the time of his re-admission, but not having practised in the interval, was or was not nevertheless an attorney on the rolls of that court at the time when he was admitted an attorney of the court of Common Pleas as stated in the replication to the said plea. And also, that the rejoinder is argumentative, and no certain or sufficient or material issue can be taken thereon. And also, that the rejoinder is an indirect and argumentative traverse of the averment in the replication to the said plea, that the said *H. Wilton* did not practise as an attorney from the time of his re-admission in the court of King's Bench until the time of his obtaining the certificate in the said plea lastly mentioned. Also, that the rejoinder is no answer to the replication to the said plea. Also, that the rejoinder, even supposing it contains matter of answer to the replication, so far as regards business in the common law courts, contains no matter of answer to the replication, so far as regards the business done in the court of Chancery.

Joinder in demurrer.

Wightman in support of the demurrer. It may be admitted that as the plaintiff took this bill after it became due, he stands in the same situation as *Wilton* himself would have done. This, however, is not the ordinary case of an attorney's suing for his fees, but it is an action brought upon a bill of exchange, the consideration of which was work done in that character. The distinction is material, for if the client choose to state an account with the attorney, and to

give him a bill of exchange for what is found due, the Court will not say that the consideration is illegal. Supposing the defendant had paid this bill, could he have recovered back the amount? In *Grant* v. *Welchman* (*a*) it was held to be no objection to an action on a note, that it had been given as part of the consideration of an indenture of apprenticeship for less than seven years, such an indenture being only voidable. That case shews the distinction between an action on a bill of exchange and one brought on the consideration for which such bill was given.

The principal question, however, is, whether *Wilton* was duly qualified to practise during the time that the business was done in respect of which the bill was drawn. The plea states that he was admitted an attorney in 1810, but did not take out his certificate until 1813, when he began to practise, and that he afterwards neglected to obtain a certificate for the space of three years, and thereby became incapable of practising, his admission being rendered void. It then proceeds to state, that in 1823 he was re-admitted in the King's Bench, but took out no certificate for more than a year after such re-admission. Had the case rested there, the plaintiff would have been entitled to judgment, for the defendant ought to exclude all contrary presumption; and it is consistent with all that is stated in the plea, that *Wilton* afterwards, and before the business was done, was admitted an attorney of this Court. The replication introduces new matter; first, that *Wilton* did not practise between the period of his re-admission in the King's Bench in 1823, and the obtaining of his certificate in 1826; that he was admitted an attorney of this Court in *Hilary* term, 1826, and that having been originally admitted a solicitor in 1810, he was, in *Michaelmas* term, 1826, re-admitted in Chancery;

(*a*) 16 *East*, 207.

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that he took out a certificate in *March* 1826, which was regularly renewed down to the year 1830, and that all the business for which the bill of exchange was drawn was done between 1826 and 1831. The rejoinder, not denying the admission here, says it was by virtue of a certain contract inrolled in the King's Bench under which *Wilton* had been admitted and re-admitted an attorney in that court. This is consistent with the case set up in the replication, that after *Wilton* was disabled from practising in the King's Bench he was admitted in this Court on an original admission. The rejoinder proceeds to state that the admission here was "without payment of any further duty." It should have been shewn what duty was meant. *Wilton* may have paid the whole duty of 25*l.*, and on his so doing, this Court might admit him, for there is nothing in the rejoinder to connect the payment with any re-admission. The rejoinder might have stated, that *Wilton*, in order to be admitted in this Court, made use of his admission and re-admission in the Queen's Bench, and only paid the duty payable after a previous admission in another court. But it merely states that he was admitted without payment of any further duty. [*Tindal* C. J. The rejoinder says that he was admitted by virtue of articles inrolled in the King's Bench, under which he had been admitted and re-admitted in that court; is not that an evasion of the law? He comes here keeping back that he had ceased to be an attorney of another court.] Supposing he had come to this Court and asked to be admitted for the first time, and the Court, having found out that he had omitted to take out his certificate in another court for a year, had agreed to admit him on payment of a year's duty, would not that have been consistent with this statement in the rejoinder? The Court might say that this would not let him get rid of the arrears of

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duty, and might compel him to pay them; but there is nothing here to shew that he did not do so. The defendant ought by proper averments to have negatived every presumption that the duty was paid; for where he seeks to avail himself of a penal statute, he is bound to shew that *Wilton* has been guilty of a breach of its provisions, which the Court will not otherwise assume. Admitting, however, for the sake of argument, that no stamp duty was paid in the admission in this Court, there is no clause in any of the stamp acts rendering the admission void. With respect to the disabling clauses of the 37 *G.* 3. *c.* 90. *ss.* 30. and 31., they are clearly not applicable to the present case. The point now raised is different from that decided in *Wilton* v. *Chambers* (*a*), or in *Paget* v. *Chambers* (*b*); in which latter case, the admission of *Wilton* in this Court was held not to be void. In *Ex parte Chambers in re Wilton* (*c*), it was expressly ruled that *Wilton* was a good solicitor of the court of Chancery, and that alone is sufficient to decide the present question, as it is consistent with the allegation in the plea that all the business was done in Chancery. On the whole, it is submitted, first, that it does not appear on the rejoinder that the admission in this Court was irregular; and that if it is intended to be said that no further duty was paid, it was incumbent on the defendant to shew what had been paid; or if it is meant that no duty at all was paid, it should have been expressly stated, in order to bring *Wilton* within the operation of a penal statute. Secondly, even supposing the admission to have been without payment of any duty, the admission is not therefore void so as to disable *Wilton* from practising, although he may have subjected himself to penalties.

(*a*) 7 *A. & E.* 524.; 2 *N. & P.* 392.

(*b*) 5 *New Cases*, 630. 7 *Scott*, 610.

(*c*) 2 *Keene*, 497.

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Thirdly, allowing such admission to be void, *Wilton* was a good solicitor, and there is nothing to shew all the business was not done in Chancery.

Channell, Serjt. (with whom was *Talfourd*, Serjt.), *contrà*. The rejoinder is sufficient to raise the question intended to be argued. The plea states the precise facts that were before the court in *Wilton* v. *Chambers*, with respect to the admission of *Wilton* in the King's Bench in 1810, and his re-admission in that court in 1823, and his neglect for more than a year afterwards to obtain a certificate. The replication admits the facts set forth in the plea, and states new facts which were not before the Queen's Bench. It relies on the admission of *Wilton* in this Court in *Hilary* term, 1826, and his re-admission in Chancery in *Michaelmas* term in the same year. The effect of the rejoinder is to confess the replication in point of fact, and to avoid it in point of law. The rejoinder states that *Wilton* was admitted in this Court "without payment of any further duty in that behalf, according to the form of the statute in that behalf." There is no special demurrer to this averment on the ground of uncertainty, and in substance it is an allegation that *Wilton* was admitted here without any duty being paid on that occasion. It is submitted, that if the admission in this Court is to be taken to be a re-admission, it is clearly not valid; for the 37 *G.* 3. *c.* 90. *s.* 31. only empowers the Court to re-admit a party whose original admission has become void by neglecting to take out a certificate for a year, on payment of the arrears of duty accrued subsequent to the expiration of the last certificate obtained by such person, and such further sum, by way of penalty, as the Court shall direct. Undoubtedly it has been held, in a variety of cases, that an attorney who has neglected to take out his certificate may be re-admitted without paying the arrears of duty; *Ex parte*

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Nicholas (*a*), *Ex parte Matson* (*b*), *Ex parte Cunningham.* (*c*) Those cases proceeded on the ground that an omission to take out a certificate, the party not practising in the mean time, was not a culpable neglect within the thirty-first section of the 37 *G.* 3. *c.* 90.; but that point was before the court in *Wilton* v. *Chambers*, and was, in effect, over-ruled. The inference to be drawn from that case is not affected either by *Paget* v. *Chambers* or by *Ex parte Chambers.* In the former case the court did not consider the admission valid, but merely refused to strike *Wilton* off the rolls, and in neither case was the fact of the non-payment of duty before the court.

If this is to be regarded as an original admission, it may be conceded that there is no clause in the general stamp act, 55 *G.* 3. *c.* 184., rendering an admission void for non-payment of duty; but it is submitted that the payment of duty is clearly a condition precedent to a valid admission. By the 22 *G.* 2. *c.* 46. *s.* 12. persons acting as attorneys, unless admitted and duly entered on the roll, are subjected to the penalty of 50*l.* This provision is to be considered as engrafted on the general stamp act; and if so, a person practising without being duly admitted is liable to the same penalty as is imposed by the 37 *G.* 3. *c.* 90. for practising without a certificate. The general stamp act exempts a party from the duty of 25*l.*, payable on admissions, who has already been admitted in any of the other courts at *Westminster*, provided he has paid the proper stamp duty on such former admission. Here it sufficiently appears on the rejoinder that no duty was paid except on the first admission in the King's Bench; and also that the party was not within the exemption of the stamp act, having at that

(*a*) 6 *Taunt.* 408.; 2 *Marsh.* 123.

(*b*) 2 *D. & R.* 239.

(*c*) 1 *Bingh.* 91.; 7 *Moore*, 410.

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time ceased to be an attorney of that court. Consequently, even allowing this to be an admission and not a re-admission, it is shewn that he did not pay the duty of 25*l.* which he was liable to pay over again on being admitted in this Court.

Wightman in reply. There is no doubt that the admission in this Court was an original admission, and it was so considered in *Paget* v. *Chambers*. Then is the admission void for non-payment of duty? What is meant by the words "without payment of any further duty?" On an original admission no money is paid; but the proper stamp is affixed to the paper on which the admission is written. Those words rather seem to apply to a re-admission where the Court imposes the payment of the arrears of duty, but are inapplicable to the present case.

TINDAL C. J. This is an action on a bill of exchange drawn by *Henry Wilton* upon, and accepted by, the defendant, and indorsed by *Wilton* to the plaintiff; and as it appears that the indorsement was not made until after the bill became due, the plaintiff must stand in the same situation as the original drawer. The answer set up to the action amounts, in substance, to this, that the bill was given for work and labour performed by *Wilton* as the attorney and solicitor of the defendant; and that at the time when the business was done *Wilton* was uncertificated, and therefore could not sue for and recover his fees, or he was not an attorney at all. In either case, if it be shewn that he was in the one or the other of those predicaments, the same consequences will follow: he can bring no action for the work and labour performed, and, besides, has subjected himself to penalties, the words of the 37 *G.* 3. *c.* 90. *s.* 30. being substantially the same as those of the 2 *G.* 2. *c.* 23. *s.* 24.

and the 22 *G.* 2. *c.* 46. *s.* 12., which prohibit parties from practising as attorneys without being duly admitted.

This defence does not range itself within the class of cases arising upon the statutes relating to stock-jobbing, gambling, and usury, in which the consideration is illegal; but rests simply upon the ground, that as *Wilton* could not have sued for the business performed by him, the giving of this bill was a voluntary act on the part of the defendant, and therefore without consideration.

The points for our consideration are, whether, at the time the work was done for which the bill was given, *Wilton* either was uncertificated or was not duly admitted as an attorney.

With respect to the first of these questions, there is no ground for saying that he was uncertificated; for the replication contains a direct allegation that he was admitted an attorney of this Court in *Hilary* term, 1826; that he took out his certificate in *March* following, which was regularly renewed for the four ensuing years, so as to cover the period of time during which the work in question was done.

This reduces the question to the single point, whether he was an attorney duly admitted. It appears that in 1810 he was admitted an attorney of the Court of King's Bench, and also a solicitor in Chancery. For some years he did not take out a certificate, which he was not bound to do until he began to practise. In 1813 he obtained his first certificate, which he renewed regularly until 1819; but he omitted to do so for the three ensuing years. Therefore, to enable him to practise, it became necessary for him to be re-admitted, and accordingly, in *Trinity* term, 1823, he was re-admitted an attorney of the King's Bench. After such re-admission, he neglected to take out a certificate for more than

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a year, and, according to the decision in *Wilton* v. *Chambers* (*a*), he ceased to be an attorney of that court. On the 20th of *January* 1826, being at that time off the rolls of all the courts, he took out a certificate — a step that was wholly inoperative, neither telling for him nor against him. Three days after, he was admitted an attorney of this Court, and it appears from the defendant's rejoinder, that such admission took place upon his articles of clerkship, which were enrolled in the King's Bench, and without the payment of any further duty. That raises the only question in this case. In *Michaelmas* term, 1826, he was re-admitted a solicitor in Chancery. From the period of his admission in this Court until after the time when the business was done for which the bill in question was given he regularly took out a certificate. The question, therefore, turns upon whether the admission here was void. I see no necessity upon the allegation in the rejoinder to hold that an admission *de facto* is *de jure* void. The allegation that *Wilton* was admitted in this Court without the payment of any further duty is very vague; it is applicable either to a re-admission, whereon a further duty would be payable, or to an original admission chargeable with a duty of 25*l.* I see no reason for holding it to be a re-admission. Considering it, therefore, as an original admission, are we called upon to say it is void because the stamp duty of 25*l.* may not have been paid at the time? For any thing that appears to the contrary — and no authorities have been cited to shew it could not be done — the omission may have been supplied. I am not aware that the commissioners of stamps are prohibited from affixing a stamp to the admission at any subsequent time; and we cannot predicate that the proper stamp is not now upon it. At all events, the

(*a*) 7 *A. & E.* 524.; 2 *N. & P.* 392.

stamp act does not render the admission void, but its effect merely is to prevent documents that are not properly stamped from being given in evidence. If any parties had wished to raise the question, whether this admission was *ipso facto* void, they might have applied to strike Mr. *Wilton* off the rolls, and might possibly have succeeded. But, judging from the facts as they appear on this record, I do not feel called upon to say that the admission is void. I therefore think that the work in question formed a good consideration for the bill, and that the plaintiff is entitled to the judgment of the Court.

BOSANQUET J. The question in this case is, whether the bill of exchange was given without a consideration. The consideration alleged was business done for the defendant by *Wilton* as an attorney; and if at the time *Wilton* was incapable of acting in that character, then there would be no consideration for the bill. The question, therefore, comes to this, was *Wilton*, in fact, incapacitated from transacting business as an attorney? It appears that in 1826 *Wilton*, then not being an attorney of any court, made an application to be admitted in this Court, and was admitted accordingly. Upon these pleadings we must take it that the admission here was an original admission, and the question is, whether such admission was void. The thirtieth section of the 37 *G.* 3. *c.* 90. relates to a party practising as an attorney without a certificate, and for every such offence imposes a penalty of 50*l.* Mr. *Wilton*, however, did take out a certificate within a twelvemonth after his admission in this Court, and continued to do so during all the time that the business in question was transacted. The case is, therefore, not within the thirtieth section of the 37 *G.* 3. *c.* 90. Is it within the thirty-first section? That section enacts that every person admitted in any of

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the courts who shall neglect to obtain his certificate for one whole year shall be incapable of practising in his own name, and his admission shall be thenceforth null and void; but it provides that any of the courts may re-admit such person on payment to the commissioners, of the duty accrued since the expiration of the last certificate obtained by such person, and such further sum by way of penalty as the court shall direct. Upon this clause it has been held in several cases, that the liability to pay the arrears of duty and an additional penalty extends only to cases where, besides the neglect to take out a certificate, the party has practised in the mean time. But here the allegation simply is, that *Wilton* omitted to take out his certificate upon his re-admission in the King's Bench in 1823. The case, therefore, does not appear to be brought within the thirty-first section. But it is said, that at all events the duty of 25*l.* imposed on original admissions was not paid by *Wilton* on being admitted here. The allegation in the rejoinder with respect to this is so framed, that it is difficult to make out what it means. What sum had been paid before, and whether any other sum was paid then, it is impossible to say; there is certainly no specific averment that the duty of 25*l.* was not paid. Independently, however, of this, I am not prepared to say, that by the nonpayment of the duty the admission was rendered void. The party, by omitting to pay it, might expose himself to a penalty, or be liable to have his admission cancelled. In general, the want of a stamp does not make an instrument void; but if you wish to make use of it in evidence you must get it properly stamped. Now all that appears here is, that some duty which should have been paid was not paid at the time, and that neglect, as has already been observed, may since have been supplied. On the whole, I am of opinion that *Wilton* was an attorney duly admitted and certificated during the

period when the business was done, in respect of which the bill declared on was given.

COLTMAN J. Several points have arisen in this case on which it is unnecessary to give any opinion. It is clear that *Wilton* was an admitted and certificated attorney at the time when the business for the defendant was done. Upon the pleadings, the admission in this Court must be taken to have been an original admission. The simple point is, whether such an admission without payment of duty is necessarily void. Very stringent rules are laid down to compel the payment of the stamp duties; and the commissioners may in all instances proceed to recover the amount, or to enforce the penalties to which parties have rendered themselves liable by nonpayment of duty. The penal clauses, however, of the stamp acts are not to be extended beyond their express provisions. I do not find that these statutes contain any enactment rendering an admission of an attorney void for nonpayment of the duty chargeable thereon. I therefore think that *Wilton* was entitled to maintain an action for his fees, and, consequently, that the plaintiff must recover.

ERSKINE J. As the plaintiff stands in the same situation as *Wilton*, the case is as if the latter were now bringing an action against the defendant for business done by him as an attorney. In *Wilton* v. *Chambers* the court of King's Bench not only held that *Wilton*, by omitting within a year after his re-admission there to obtain a certificate, had ceased to be an attorney of that court, but also that all securities taken for business subsequently done by him were absolutely void. The question therefore is, whether *Wilton* could have maintained an action for the fees in respect of which this bill of exchange was given. The plea appears framed

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upon the thirtieth section of the 37 *G.* 3. *c.* 90., and not upon the thirty-first; and if the case had stopped there, it would have been a sufficient answer to the action, for it states that *Wilton* did not take out a certificate within a year after his re-admission in the King's Bench, and therefore from that time he ceased to be an attorney of that court, and he was not then an attorney of any other: but the replication, admitting the plea to be an answer to the declaration, introduces other facts, namely, the admission, in 1826, of *Wilton* as an attorney of this court, and also as a solicitor in Chancery. Then the defendant proceeds, not upon the ground given by the thirtieth section of the 37 *G.* 3. *c.* 90., that *Wilton* had not duly taken out a certificate after his admission here, but he alleges that, although he was admitted here, and he obtained his certificate on that occasion, yet that such admission was void in law, having been made "without payment of any further duty." The objection is taken in the alternative; and it is contended that, whether the admission is to be considered as a re-admission or an original admission, it is equally void, for in neither case has the proper stamp duty been paid. It is unnecessary to consider the cases that have been cited with respect to the power of the courts to re-admit without payment of the arrears of duty, inasmuch as there is nothing on the record to shew that this was a re-admission. I agree with the rest of the court that it is to be considered as an original admission, and also that the nonpayment of the duty at the time does not render the admission void, although it may subject the party to a penalty. I am, therefore, of opinion, that *Wilton* was an attorney, duly admitted and certificated, during the period when the business was done, and that there was nothing to prevent him from suing for his fees, or from taking this bill of exchange for the amount.

Judgment for the plaintiff.

BROWN *v.* STOREY and Others.

Thursday, April 16th.

TRESPASS. The declaration stated that the defendants on the 9th of *August* 1839, and on divers days, &c., broke and entered three closes of the plaintiff in *St. Andrew Auckland*, in the county of *Durham*, called the *Brick-Garth*, *Middle-Field*, and *Old-Grass-Field* (the respective abuttals of which were set forth) and broke the gates, locks, &c., carried away hay, grass, &c., broke hedges and fences, and railed in and blocked up a cowhouse.

Plea. 1st, Not Guilty. 2dly, That the closes in which, &c., were not the closes of the plaintiff, nor were the gates, &c., the property of the plaintiff. 3dly, That the closes in which, &c., were within and parcel of the manor of *Bondgate-in-Auckland*, and a customary tenement of the said manor demised and demisable by copy of court roll, in fee-simple or otherwise, according to the custom of the court of the manor. That before the said time when, &c., to wit, 17th July 1839, *Edward*, Lord Bishop of *Durham*, in right of his bishoprick, being lord of the said manor, out of court before *William Dean*, then being deputy, for that time only, of *Alexander Atherton Park*, then being steward of the court of the said manor, by copy of court roll, granted the said customary tenement to *Francis Mewburn* and *William Trotter*, *habendum* to *Mewburn* and

A., after mortgaging in fee to *B.*, demises to *C.* for years from *Lady-day*, at a quarterly rent. *A.* afterwards sells the equity of redemption in parcel of the mortgaged premises to *B.* *B.* in *August* gives notice of the mortgage, and requires *C.* to pay to himself, and not to *A.*, rents then due or thereafter to become due from *C.* in respect of the mortgaged premises. *B.* then enters upon the parcel sold. In *December* *C.* tenders to *B.* three quarters' rent,

due upon the lease, at *Michaelmas*, which *B.* refuses to accept. Held, that this notice was sufficient to establish the affirmative of an issue taken upon an allegation, that *B.* demised to *C. for one year from the date of the notice.*

The Judge having told the jury that by that notice *alone C.* became tenant to *B.* Held, that it was no ground of objection to the Judge's direction that he omitted to leave it to the jury to say whether *C. assented* to the proposal of a demise involved in the notice, it not having been requested that this question should be so left.

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Trotter, and their sequels (*a*) in right, according to the custom of the court of the said manor. That *Mewburn* and *Trotter* were admitted tenants and entered, and became and were seised according to the custom of the court of the said manor, and continued so seised until and at, &c. That defendants at, &c., as the servants of *Mewburn* and *Trotter*, and by their command broke and entered, &c. 4thly, Leave and licence.

The replication joined issue upon the first and second pleas.

To the third plea the plaintiff replied, that before the grant to *Mewburn* and *Trotter* the plaintiff was possessed of the closes in which, &c., as tenant to *William Brown* for an unexpired term, at the rent of 51*l.* 13*s.* 4*d.*; that after the grant to and admittance of *Mewburn* and *Trotter*, they consented and agreed with the plaintiff to *continue* the plaintiff at the same rent; that thereupon for that purpose, on the 1st of *August* 1839, they demised the closes in which, &c., to the plaintiff, *habendum for one year from thence ensuing*, by virtue of which demise the plaintiff was, &c., continued possessed until the defendants afterwards, and during the continuance of the demise, committed the trespasses.

Replication to the fourth plea, denying the leave and licence.

Rejoinder. That *Mewburn* and *Trotter* did not demise to the plaintiff *modo et formâ*.

At the trial before *Erskine* J. at the last *Durham* Spring assizes, the following facts appeared: —

In the early part of 1837 a company was projected

(*a*) The *heirs* of freemen entered upon the death of the ancestor, as of right, the *sequels* of villeins were permitted to *follow* in the possession, &c. *Vide* 3 *Mann. & Ryl.* 190. 198. And see "Sequaces" used in the sense of "heirs." *Ducange, in verbo.* Dr. *Cowell* explains *sequela villanorum* by "the retinue and appurtenances to the goods and chattels of servile tenants;" but the passages cited by him are not inconsistent with what appears to be the genuine meaning of the term.

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for making a railway, which was to be called "The *Bishop-Auckland-and-Weardale* Railway, in connection with the *Stockton-and-Darlington* Railway." On the 8th of *April* 1837, before the company was incorporated, a contract under seal was made between *William Brown*, as owner of the three closes in question, through which the projected railway was to pass, and *George Coates* the younger, on behalf of the intended company, of which the material parts were as follows: —

The said *William Brown* agrees to sell and the said *George Coates* agrees to purchase, for the use of the said company to be incorporated by act of parliament, all that stripe or piece of ground containing, by admeasurement, three roods thirty-five perches, and which is particularly delineated on the plan hereto annexed, being part and parcel of three fields belonging to the said *W. Brown*, situate, &c., and in the occupation of *Richard* and *Thomas Brown*, upon which stripe the main line of the *Bishop-Auckland-and-Weardale* Railway is intended to be made and formed, (except mines and minerals and the right of working same, and also except and reserved (*a*), as hereinafter set forth, the full value of the clay, lying and being under the said stripe or piece of ground,) the price or purchase-money for the said three roods and thirty-five perches, and also the injury to be occasioned by the severing or dividing the said three fields of the said *William Brown*, so far as concerns the damage or inconvenience to be sustained for agricultural or farming purposes, but not extending to any other damage, is hereby agreed to be the sum of 210*l.* And it is hereby agreed, that if the land necessarily required for the construction of the said railway in each field shall be more or less than the quantity stated opposite thereto, in the particulars hereon indorsed, the price herein-

(*a*) What is here called an exception appears to be merely a stipulation for the payment of an additional price for something *not* excepted.

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before mentioned shall be increased or diminished according to the annual value per acre set opposite to each field; but the company shall not erect any buildings or make any depôts thereon. And the said company shall also, at their own expense, make proper and commodious communication between each of the said fields through which the railway passes, and also cause to be brought a sufficient supply of water into such of the fields as may be deprived thereof: And whereas bricks and tiles are manufactured and made from the clay procured from the fields through which the railway is intended to pass, and by the forming of the railway a large quantity of clay will be necessarily useless, and great inconvenience and damage will be sustained in working the clay and making bricks and tiles as heretofore accustomed in the fields aforesaid: And whereas it has been agreed, that the price or compensation to be paid by the company to the said *William Brown* for the clay to be covered up and rendered useless, and also all other loss, damage, detriment, and inconvenience to be suffered and sustained by the said *William Brown* by reason of the making of the said intended railway, shall be referred to the arbitrament and determination of three arbitrators, or of such two of them as shall agree in their award; such arbitrators to be appointed as hereinafter mentioned: And whereas it is hereby admitted, declared, and agreed, that the clay beneath the said stripe or piece of ground upon the surface of which the said railway is intended to be made and formed, shall be considered and taken to be of the depth of eighteen feet. Now these presents witness, that in consideration of the sum of 210*l.* so as aforesaid agreed to be given by the said *George Coates* to the said *William Brown*, and also in consideration of such further sum or sums as the clay beneath the said stripe of ground, the damages, loss, and inconvenience to be occasioned in the

working of the remainder of the clay as heretofore accustomed, the damage to be sustained by having the brick yard severed, and also all and every other loss, damage, detriment, inconvenience, and prejudice that shall be suffered and sustained by the said *William Brown* by reason of the making of the said railway (the compensation for agricultural severance excepted), shall be estimated in the manner hereinbefore mentioned, to be paid to the said *William Brown*, his executors, administrators, or assigns, or to such person or persons as he or they shall respectively appoint, by the said *George Coates*, as such agent as aforesaid. He the said *William Brown* doth hereby covenant with the said *George Coates*, that within one month from the making and publishing of the award of the said arbitrators, he, the said *William Brown*, and all proper and necessary parties, shall, if required so to do, execute a valid and effectual conveyance, surrender, and other assurance to the company of the said three roods and thirty-five perches, with the clay beneath the same, freed and discharged from all arrears of rates, taxes, and other outgoings, on payment of the said purchase-money. And it is hereby agreed, that the price to be paid by the company to the said *William Brown* for the clay beneath the said stripe of ground of the depth of eighteen feet as aforesaid, and also all and every other loss, damage, detriment, inconvenience, and prejudice for or by reason of the making of the said railway, shall be ascertained by three indifferent persons, one to be nominated and appointed by the said *William Brown*, another to be nominated by the said *George Coates*, and the third to be nominated and appointed by the two first named persons, by writing under their hands to be hereupon indorsed: Provided always, that the company, previous to their requiring the said stripe of ground, shall give to the said *William Brown* one month's notice, within which time he, as well as

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the company, shall appoint their respective arbitrators; and in consideration of the agreement hereinbefore contained on the part of the said *William Brown*, he, the said *George Coates*, as such agent as aforesaid, doth hereby covenant with the said *William Brown*, his heirs, &c., that the said *Bishop-Auckland-and-Weardale* Railway Company shall, within one month from the making and publishing of such award, or upon their sooner taking possession of the said stripe, pay to the said *William Brown*, or the person or persons entitled to receive the same, the said sum of 210*l.*, and such further sum and sums of money as the said clay and compensation for damages and injury shall, according to such valuation thereof, amount unto, and also that the company shall pay the costs, charges, and expenses of the said *William Brown* attending the reference, valuation, and compensation so to be made of the clay, damages, and injury, and the award of the arbitrators.

The act for making the *Bishop-Auckland-and-Weardale* Railway was passed in *July* 1837.

After the act was passed, three arbitrators, named pursuant to the agreement, met, and on the 1st of *May* 1838, two of them made an award, of which the following is a copy: —

"We, the undersigned arbitrators, have mutually agreed that *William Brown* shall have as a compensation for the clay taken up and covered by the railway the sum of 700*l.*, and for the detriment and inconvenience 88*l.* 18*s.* 1½*d.*, which sums make together 788*l.* 18*s.* 1½*d.*, and to make such a watercourse for the conveyance of water from the clay hole and brick yard as the said *William Brown* may require, and also to complete the cart road to the brick yard which crosses the railway to he satisfaction of the said *William Brown*."

W. Brown being dissatisfied with the award, the pur-

chase money and compensation money were paid into the Bank of *England*, pursuant to the provisions of the *Bishop-Auckland-and-Weardale* Railway Act, 1 *Vict.* c. cxxii. *s.* 38. Before the contract was completed, it was discovered that the father of *William Brown* had mortgaged the three closes in question to *William Thompson* to secure 700*l.* and interest. The company thereupon paid off *Thompson*'s mortgage, and the property was conveyed to Messrs. *Mewburn* and *Trotter* as trustees for the company; and they were admitted customary tenants of the manor under that mortgage title. The conveyance from *Thompson* to *Mewburn* and *Trotter* was executed on the 17th of *July* 1839. The plaintiff claimed under a lease from *William Brown*, the heir of the mortgagor, commencing 25th of *March* 1837.

On the 3d of *August* 1839, *Mewburn* and *Trotter* gave notice to the plaintiff, *R. Brown*, tenant in possession, of the transfer of the mortgage, and required him to pay to them, as such trustees for the company, and for their use, or to such person or persons as should be duly authorised by them to receive the same, and not to *William Brown*, the rent then due, and subsequently become due in respect of the said premises comprised in the said recited mortgage, incautiously omitting to except from the claim of *subsequent* rent the strip purchased by the company. On the 9th of *August*, the defendants, who were the contractors, engineer, and inspector of the company, took possession of the strip of land, and railed it off. Upon which the plaintiff agreed to buy of the company's agent the crops standing on the strip which had been taken possession of; but on the 17th of *August* he refused to complete the purchase, and wrote to the agent that he might take the crops. Notice of action for this trespass was given on the 18th of *November*. On the 6th of *December* the plaintiff tendered to *Trotter* 38*l.* 15*s.* for three quarters' rent due at

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Michaelmas under the lease; which *Trotter* refused to accept unless the strip of land were excepted.

It was contended by the plaintiff that the notice, coupled with the other facts, established the demise.

The defendants contended that the notice was given in ignorance of the lease from *William Brown* to the plaintiff, and of the fact that the plaintiff, at the time of the notice, was in possession of the strip of land. The learned Judge told the jury that the only question for their consideration was, whether *Mewburn* and *Trotter*, when they received the notice of 1st of *August* 1839, knew that the plaintiff was tenant of the strip of land taken by the company, and that if at the time the notice was served, *M.* and *T.* knew that the plaintiff was *tenant* to *W. Brown* of that strip, he was of opinion that by that notice alone the plaintiff became *tenant* to them.

The jury having found a verdict for the plaintiff upon all the four issues,

Channell Serjt. now moved for a rule *nisi* for a new trial, on the ground of misdirection. In *Pope* v. *Biggs* (*a*) it was said by *Bayley* J. that the mortgagee, by giving notice to the tenant of the mortgagor, holding by demise made subsequently to the mortgage, to pay his past and future rent to himself and not to his mortgagor, rendered the tenant his tenant. But it is submitted that a mere notice, without acquiescence on the part of the tenant, cannot constitute the relation of landlord and tenant between them. That relation can only be created by contract; *Evans* v. *Elliott*. (*b*) Here no agreement

(*a*) 9 *B. & Cress.* 245.; 4 *Mann. & Ryl.* 193., overruled in effect by *Partington* v. *Woodcock*, 5 *Nev. & Mann.* 672., And see the notes to 4 *Mann. & Ryl.* 197, 198.; *Roscoe on Actions relating to Real Property*, 525.; *Coope* v. *Blandy*, 1 *New Cases*, 45., and 4 *Moore & Scott*, 562.; 5 *Nev. & Mann.* 514. (*w*); *Doe d. Old* v. *Vickery*, 6 *Nev. & Mann.* 437.

(*b*) 9 *Adol. & Ell.* 342., 1 *Nev. & Perr.* 256.

was shewn, on the part of the plaintiff, to any of the stipulations contained in the notice, and no circumstances occurred between the 3d of *August*, when the notice was served, and the 9th of *August*, when the alleged trespass was committed, to make the situation of the parties different to what it had been on the former day. The rent due was not paid. [*Tindal* C. J. The plaintiff remained in possession.] It was not so left to the jury. On the contrary, the plaintiff bargained for the possession on a day subsequent to the notice. The jury were told that a notice served on the tenant would, under the circumstances, create a tenancy. It should have been left to the jury whether *Mewburn* and *Trotter*, when they served the notice, knew that the disputed land was *in possession* of the plaintiff. [*Bosanquet* J. Did you ask the learned Judge so to leave it to the jury? *Erskine* J. The plaintiff had no other title to the possession than under the demise from *Mewburn* and *Trotter*. *Tindal* C. J. *Res ipsa loquitur*.] It was stated to the jury, as a point of law, that the notice created a tenancy. In *Rogers* v. *Humphreys* (*a*) it was held, that where a lease is made by the mortgagor subsequently to the mortgage, the mortgagee may treat the tenant as a trespasser; but that he cannot distrain or sue for rent, unless he has accepted rent from the tenant or has given him notice to pay rent, and the tenant has acquiesced. In *Waddilove* v. *Barnett* (*b*) it was held that a notice by a mortgagee to the tenant of the mortgagor, who had come into possession under a lease granted subsequently to the mortgage, was a good defence to an action for use and occupation brought by the mortgagor; but that was in the nature of an eviction by the mortgagee. In both *Pope* v. *Biggs* and *Waddilove* v. *Barnett* the question was, what payments were protected by the notice, not whether the

(*a*) 4 *Ad. & Ell.* 299.; 5 *Nev. & Mann.* 511.

(*b*) 2 *New Cases*, 538.; 2 *Scott*, 763.

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relation of landlord and tenant was constituted. In *Partington* v. *Woodcock* (*a*), *Patteson* J. says, "I never could see how notice could make the mortgagor's tenant tenant to the mortgagee at the former rent." There was no evidence to be left to a jury of any demise for a year. The plaintiff cannot eke out his proof by referring to another allegation in the replication. (*b*) If there was any demise in this case, it would be a demise to hold during the residue of the term created by the mortgagor.

TINDAL C. J. I agree that the relation of landlord and tenant cannot be created without the consent of both parties. Here both tenant and landlord agreed that the former should remain in possession for a year. It has been settled ever since the case of *Keech* v. *Hall* (*c*), that a mortgagor cannot, without the privity of the mortgagee, create a tenancy, and the mortgagee may recover in ejectment without giving notice to quit, against a tenant who claims under a lease from the mortgagor, granted subsequently to the mortgage. No interest can pass to the tenant, and ejectment may be maintained

(*a*) 6 *Ad. & Ell.* 695.

(*b*) If the *modo et forma* put these allegations in issue, the replication was disproved, because the plaintiff never did hold as tenant to *W. Brown*, except by estoppel between *W. Brown* and the plaintiff, to which estoppel the defendants were neither parties nor privies. Again, the allegation that the copyholders agreed with the plaintiff to *continue* him tenant at the same rent, would imply that they adopted the terms of the demise by *W. Brown*; and so the plaintiff appears to have understood when he tendered the rent agreeably to the original demise; whereas treating the notice as a demise from one year from the 1st of *August*, the plaintiff would be excused from the payment of any rent in respect of the occupation from *Midsummer* to the 1st of *August*.

The introductory part of the replication to the third plea, supposing it not to be surplusage, or mere matter of inducement, would be informal, as setting up a particular estate without shewing the commencement of that estate. *Vide Com. Dig.* tit. *Pleader* (E 19.).

(*c*) 1 *Dougl.* 21.

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without notice; but from the case referred to, and from many subsequent, it appears that mortgagees may adopt the act of the mortgagor in granting the lease; or at least he may create a tenancy from year to year, according to the terms of the lease. Here the evidence was, that after the assignment of the mortgage notice was given, by the assignees of the mortgagee to the plaintiff, to pay to them the rent then due, and thereafter to become due in respect of the premises comprised in the mortgage, which appears to import a consent that he should hold at least for one year. It is said that there was no agreement in fact, and that it was not left to the jury as a matter for their consideration, whether they would infer an agreement. The question was not left to the jury in precise terms, but without doubt it would have been so left if the counsel had supposed that the jury would hesitate to draw that inference. The plaintiff's only title to the possession was the lease from the mortgagor. From the parties in whom was the legal interest he receives a notice requiring payment of the rent due and accruing due. If he remained in possession without repudiating the notice, he seems to have been in possession under the old terms. Counsel might have required the learned Judge to leave it to the jury to consider whether the plaintiff acquiesced in the notice, because all parties must have assented. It is not clear, that upon the issue joined upon this replication (*a*) it was necessary to shew an attornment. In *Hudson* v. *Jones* (*b*), an avowant made title by grant of a reversion expectant on an estate for life to the plaintiff, unto which reversion there was a rent incident, *ad quam quidem*

(*a*) *Suprà*.

(*b*) 1 *Salk*. 90. That case occurred before the 4 & 5 *Ann*. c. 16., which renders attornment in all cases unnecessary, had come into operation. But neither before nor since the passing of that statute would the rights of the parties in the principal case, it is conceived, have been affected by the law of attornment. *Post*, 128 (*a*).

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concessionem, the plaintiff (being the particular tenant) did attorn. The plaintiff pleaded *non concessit modo et formâ*. It was held, that under the issue the defendant could not set up want of attornment. It would therefore seem that no distinct act of assent need have been proved. I do not, however, put it on that ground: I think it to be plain that there is no reason for sending this case to a new trial.

BOSANQUET J. I am also of opinion that this verdict ought not to be disturbed. It was left to the jury to say, whether the notice was given in ignorance of the existence of the lease. It is said, that it ought to have been left to them to say, whether the plaintiff assented to a new tenancy. It is clear that there can be no demise without an assent by both parties. But if it had been wished to raise the point of want of assent, that should have been suggested to the learned Judge. If it had been, the jury could have found but one way.

ERSKINE J. The only question raised by the defendants' counsel was, whether the tenant, having elected to continue, the notice, if accepted by both parties, amounted to a demise for one year. It appeared that the plaintiff had tendered the rent accruing subsequently to the notice to *Mewburn* and *Trotter*. It was not suggested that the plaintiff had repudiated the offer of a tenancy contained in the notice. I was of opinion that *Mewburn* and *Trotter*, by their notice, had adopted the plaintiff as a yearly tenant at the rent he had paid under the lease. The parties who gave the notice were fully cognisant of all the circumstances.

Rule refused. (*a*)

(*a*) Before the 4 & 5 *Ann.* c. 16., an attornment was an acknowledgment by the owner of a particular estate that the reversion had been lawfully conveyed from the original reversioner to a new reversioner, and an acceptance by the tenant

of the new lord. Before such acceptance, the assignee of the reversion had only an inchoate title. He could not distrain, nor could he maintain a writ of waste. An attornment was not, however, necessary in those cases where the party came to the reversion by matter in law, as heir, by descent, husband, by marriage, incumbent, by induction, &c., but only where he acquired the reversionary interest by his own act, as a purchaser; and, even there, if the alienation were *by fine*, the tenant was not allowed to frustrate the act of the court by withholding his attornment; and if he refused to accept the conusee of the fine as his lord, he might be compelled to do so, upon a writ of *quem reddidit reddit, per quæ servitia*, or *quid juris clamat*, according to the nature of the case, in which actions mesne process by *venire facias ad attornandum*, and, if necessary, by *distringas ad attornandum*, issued against the repugnant tenant. The declaration upon these writs concluded with a prayer that the defendant *se attornet*, *Rast. Ent.* 460. 535. After judgment *quod se attornet*, if the tenant still held out, process of imprisonment issued, *Hil.* 37 *H.* 6, fo. 13, pl. 3. And it was asserted by one judge, but denied by another, that the effect of the imprisonment was, to place the conusee of the fine in the same situation as if the tenant had actually attorned. *Ibid.* The defendant having attorned in court, final judgment was given, "that the fine be ingrossed." *Rast. Ent.* *ubi supra.*

An attornment was also necessary where the grantee of a rent-charge or rent-seck assigned or granted the rent over; and the assignee was not completely seised of the rent until the ter-tenant had attorned to the assignment.

An attornment was not necessary where the estate vested by the statute of uses, or of wills; and see 6 *Nev. & Mann.* 161. And now by 4 & 5 *Ann.* c. 16. the necessity for an attornment is in all cases taken away, and, since that statute came into operation, upon the execution by the grantor of the deed containing the grant of the reversion, the grantee becomes, *ipso facto*, complete reversioner and lord, and upon the execution of the deed containing an assignment of a rent-charge or rent-seck, the assignee becomes, *ipso facto*, seised of the rent. From that period, *legal* attornments have ceased to exist; but the term has been applied, particularly in courts of equity, in a loose and popular, or, at least, in a secondary sense, (to which the legal doctrine of attornment is not applicable,) to such acknowledgments of tenancy as either create a title by estoppel between the party making the acknowledgment and the party to whom it is made, or may afford *primâ facie* evidence of title against the acknowledging party. As to the different effect of estoppels between landlord and tenant, arising by indenture, and of those resulting from acceptance of the possession, see 4 *Nev. & Mann.* 29.

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ARMITAGE *v.* WINTERBOTTOM and HEXTALL, Clerk.

A., a manufacturer, contracts with *B.*, *C.*, and *D.*, who are partners, occupying a mill the property of *B.*, for the drying of his wool in a room in the mill. *B.*, *C.*, and *D.* effect an insurance on the mill, covering wool in the room. *D.* retires from the partnership, after which *C.* and *D.* have no interest in the room. *B.* and *C.* effect another insurance, also covering goods in the room. A dissolution of partnership take place between *B.* and *C.*, which is not communicated to *A.* *C.* afterward effects a similar insurance in his sole name, and *A.*'s wool being damaged b fire, the insurance office pays the proceeds of the damaged wool to *A.*, an the amount of loss on the wool, to the extent of the sum insured thereon, t *C.* Similar losses had been paid by the partnership to *A.* under the forme policies. Held, that as it was not shewn that *B.* had authorised the effectin of the then policy, or that the partnership was bound to insure (*a*), an actio for money had and received could not be maintained by *A.* against *B.* and *C jointly.*

ASSUMPSIT upon an agreement by which, in consideration that the plaintiff would engage and employ the defendants for one whole year, and from year to year, to find and provide the plaintiff with a certain quantity of steam power at a certain mill of the defendants, and certain standing room in the said mill; and also to dry wool for the plaintiff in and upon a certain drying-house of the defendants, at and for 200*l.* per annum by half-yearly payments, the defendants promised the plaintiff to provide him with the said steam power and standing room, and to dry the said wool for the plaintiff in and upon the said drying-house; *and also to indemnify* the plaintiff from all loss or damage which might accru to him by reason of the destruction or damaging of suc wool or any part thereof by fire, whilst the same wa in and upon the said drying-house for the purpose o being dried as aforesaid. Averment: that the defendant did provide the plaintiff with steam power and standing room, and also dry divers large quantities of wool, to wit

(*a*) And see *Dig. Lib.* 17. (*Pro Socio,*) tit. 4. l. 12.; *Ib.* tit. 2. l. 40.; *Ib.* tit. 2. l. 52. § 4.; *Ib.* tit. 2. l. 61.; *Pothier, Traité du Contrat de Société,* No. 127, 128, 129, 130. *Rothwell* v. *Humphreys*, 1 *Esp N. P. C.* 406.; *Raba* v. *Ry land*, *Gow. N. P. C.* 135.

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&c., of and for the plaintiff, in and upon the said drying-house; and although the plaintiff did pay the defendants the said sum of 200*l.*, and although afterwards, to wit, &c. divers large quantities of wool of the plaintiff to wit, &c., of the value of 100*l.*, which were then in and upon the said drying-house, for the purpose of being dried as aforesaid, were totally consumed and destroyed by fire, whereby the plaintiff then sustained great loss and damage to wit, &c., whereof the defendants had notice, and were required by the plaintiff to indemnify him from such loss and damage according to their promise in that behalf; nevertheless the defendants, not regarding &c., have not yet paid to the plaintiff the value of the said last-mentioned wool, or any part thereof, or in any manner indemnified him from the loss of the same, but have hitherto always neglected, &c. The declaration also contained counts for money had and received, and upon an account stated.

Plea: First, *non assumpsit*. Secondly, by defendant *Winterbottom* as to the first count, that the wool was not in or upon the said drying-house for the purpose of being there dried by the defendants pursuant to their promise *modo et formâ*. Second plea by the defendant *Hestall*, that no wool whatever of the plaintiff, being in or upon the said drying-house, for the purpose of being dried, as in the said first count mentioned upon the terms therein on that behalf stated, was ever consumed or destroyed by fire, *modo et formâ*.

The particulars of the plaintiff's demand under the *indebitatus* counts were, for 56*l.*, for money had and received by the defendants for the use of the plaintiff from the *West of England* Insurance Office in the year 1838.

At the trial before *Erskine* J. at the last *Liverpool* assizes, the following facts appeared. The plaintiff is a woollen cloth manufacturer at *Paddock*, near *Huddersfield*. The defendant *Winterbottom* is the owner of

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the mill mentioned in the declaration. In 1833, the plaintiff entered into a written agreement with *Winterbottom* and Co., which firm then consisted of the defendant *Winterbottom*, the defendant *Hextall*, and one *Saville* to the effect stated in the declaration, except that it was silent as to any engagement to indemnify. This defect the plaintiff sought to supply by setting up a custom to indemnify. For the defendants it was contended that no addition could be made to the written contract. The learned judge, however, received the evidence giving the defendants leave to move to enter a nonsuit in case the court should be of opinion that the evidence was not receivable. The evidence was given, but proved to be insufficient. The plaintiff then resorted to the count for money had and received. The mill and premises were insured by *Winterbottom* and Co., in the *West of England* Insurance Office against loss or damage by fire with the property and machinery therein by a policy, dated the 1st of *September* 1834. In 1835 *Saville* retired from the firm, and on the 16th of *September* in that year a fresh policy was effected. In 1837 *Winterbottom* by notice in the Gazette, dissolved his partnership with *Hextall*, and in *June* 1837 a fresh policy was granted to the Rev. *John Hextall* in his sole name. The insurance was for 1100*l.* 8*s.* 6*d.*, divided as follows:—

Machinery - - -	£1000	10
Wool in boiler stove - -	50	0
Wool and pieces in stove (the drying-house) detached from mill 20 yards, stone, and slated - -	50	18

After the first dissolution of partnership neither *Saville* nor *Hextall* had any interest in the part of the mill occupied by the plaintiff.

Fires occurred at different periods, and the amount of the injury done to the plaintiff's goods had been re

ceived from the insurance office by *Winterbottom* and Co., and by them paid over to the plaintiff. In 1838, whilst the third policy was in force, wool to the value of 65*l.* in the drying house belonging to the plaintiff was damaged by fire. The agents of the insurance office sold the damaged wool for 8*l.* 15*s.*, which they paid over to the plaintiff, and paid 50*l.* 18*s.* (*a*), on account of the plaintiff's further loss of 56*l.* 5*s.*, to the defendant *Hextall*, together with the amount of other losses covered by the policy, in which the plaintiff had no concern.

It was contended for the plaintiff, that inasmuch as the plaintiff had no notice of the dissolution of partnership between *Winterbottom* and *Hextall*, he had a right to treat the insurance as one effected by the firm for his benefit, with reference to the agreement of 1833. The learned judge told the jury that the receipt by *Hextall* of the value of the plaintiff's goods from the insurance office would have entitled the plaintiff to a verdict against *Hextall*, if *Hextall* had been sued alone, but that to recover against the two defendants as for money had and received to the plaintiff's use, it must be shewn that the money was paid to both: and that there was no evidence that the money was received by both. The jury having found a general verdict (*b*) for the defendant,

Wortley (*c*) now moved to set aside on the ground of misdirection, and as against evidence. In *Sidaways* v. *Todd* (*d*), it was ruled by *Abbott* C. J. that, if wharfingers effect an insurance on goods deposited in their

(*a*) The amount covered by the policy.

(*b*) The plaintiff would appear to have been entitled to a verdict on the second and third issues.

(*c*) *Dundas* led for the plaintiff at the trial; but the cause had been entered and withdrawn at the Summer Assizes, when *Wortley* was alone for the plaintiff. *Dundas*, not having been in the cause before the ancient practice of the court was restored, could not have made the motion for a new trial. *Serviens ad legem*, 332.

(*d*) 2 *Stark. N. P. C.* 400.

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warehouse, and receive from the insurance office the amount of a loss by fire upon goods, &c. deposited, they may be sued by the owner of the goods as for money received for his use. [*Erskine* J. The question at the trial was, whether the money paid by the insurance office was not received by *Hextall* alone: I told the jury that, if it] was received on the joint account, the defendants were liable.] It is submitted that it should have been left to the jury to say whether the dissolution of partnership was known to the plaintiff. [*Tindal* C. J. It was not shewn to be any part of the partnership business to effect such an insurance.] The insurance was in immediate connection with the business carried on by the partnership. The learned judge told the jury that there was no evidence that the money had been received by both the defendants; from which the jury would naturally infer that it was necessary that the amount should have come into the hands of both the defendants or into some joint fund; whereas, in order to create a joint liability, it was sufficient to shew that, as against the plaintiff, both defendants continued to be partners, and that one of them received the amount of a loss arising out of a transaction in which the plaintiff had contracted with both. [*Erskine* J. If it had been the duty of the defendants to insure, then, inasmuch as the dissolution had not been announced to the plaintiff, both defendants would have been liable.]

TINDAL C. J. It appears to me that this case was very properly submitted to the jury, and that the verdict was right. The insurance was effected some time after the partnership had ceased, by *Hextall* in his own name; and it was not shewn that it was effected by the authority of *Winterbottom*. Nor was the insurance effected in pursuance of any duty shewn to be incumbent on the partnership. If it had been proved that the

partnership was bound to insure, it might have been otherwise; but there is nothing to shew but that *Hestall* may have effected the insurance for his own purposes. (a)

Rule refused.

(a) *Saville*, who had been examined for the plaintiff on the trial, had stated that after the first dissolution neither he nor *Hestall* had any thing to do with the part of the premises used by the plaintiff; and when the loss occurred, the insurance office of course would not have paid the loss, unless it had occurred in the detached stove described in the policy; but this particular fact was not before the court in banc.

DOE dem. WILLIAMS and JEFFERY *v.* COOPER.

April 24.

EJECTMENT to recover premises, situate in the *High-Street, Ryde*, in the *Isle of Wight*.

At the trial before *Coltman* J., at the last *Hampshire* assizes, the lessors of the plaintiff gave in evidence in support of their title, a lease made on the 11th of *October* 1819, by the owners of the fee, to one *Barton*, for 99 years, if three persons therein named should so long live; an assignment of the 16th *July* 1825, of part of the premises for the residue of the said term from *Barton* to one *William Kent*; an underlease bearing date the 7th of *July* 1832, of the premises comprised in the above assignment for 86 years (subject to the determination of the lives named in the original lease),

The defendant took premises of one *H.*, at a yearly rent, with an agreement for a lease for seven years, or for the lease for lives, under which *H.* held the property. *H.* subsequently assigned his interest in the premises to the lessors of the plaintiff, and their attorney, under an impression that the seven years had expired, demanded possession. The defendant said, "I hold on lives, and as long as they live I will hold the premises; you know I have an agreement." The attorney then demanded a quarter's rent which was due, but the defendant refused to pay it, saying, "I hold under *H.*, and I was directed by him to pay *K.* (who was the superior landlord), and I will do so; for how do I know he will not come and make a demand on me?" Held, no disclaimer of the title of the lessors of the plaintiff.

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from *Kent* to one *James Hillier*; — and lastly an assignment of the 24th of *July* 1837, whereby *Hillier* conveyed the last-mentioned premises to the lessors of the plaintiff.

The defendant relied on the following agreement, made the 2d of *May* 1832, between him and *Hillier*:—

"Memorandum of an agreement between *William Cooper* and *James Hillier* for a store lately used as a coal-store, and held under a lease of lives from Mr. *William Kent*, and now in the occupation of the above *James Hillier*; and he herein agrees to let the above store, situated in the *High Street*, *Ryde*, to *William Cooper*, at the yearly rent of 15*l.*, to be paid at two equal half-yearly payments, *i. e.* on the same day that *James Hillier* shall be required to pay his rent: and he further agrees to let the said *William Cooper* have a lease for seven years, or for the lease for lives under which he holds the property."

A question then arose whether the above document amounted to a demise for seven years, or only from year to year, with an agreement for a future lease; and there being also a dispute whether the date had not been altered, that point was left to the jury, who found that no alteration had been made in the date of the instrument, and consequently that the term, supposing it to be a lease for seven years, had not expired before the 25th of *October* 1839, the day of the demise laid in the declaration. For the defendant it was contended, that the agreement amounted to a lease for seven years; and that even if it established only a tenancy from year to year, the defendant had received no notice to quit. The lessors of the plaintiff insisted that no notice to quit was necessary, as there had been a disclaimer by the defendant, and called their attorney to prove that fact.

It appeared that the attorney, acting under the impression that the date of the agreement had been altered,

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and that the term of seven years had, at any rate, expired, went, on the 14th of *October* 1839, to the defendant, and demanded possession of the premises on behalf of the lessors of the plaintiff. The defendant, in answer, said, "I hold on lives, and as long as they live, I will hold the premises; I am prepared to spend a little money about it, and so are they I suppose. You know I have an agreement." The attorney then said, "Will you pay me the quarter's rent due?" To which the defendant replied, "No. I hold under *Hillier*, and I was directed by him to pay *Kent*, and I will do so; for how do I know that he will not come and make a demand upon me." The attorney said, "You paid the rent to *Williams* and *Jeffery* before, and why not now?" The defendant answered, "No, I did not: *Jeffery* deducted it; I don't know what he did with it." The attorney thereupon said, "Then I will make you pay." To which the defendant replied, "You must do the best you can, and so will I."

The learned judge intimated it as his opinion that the words did not amount to a disclaimer, but left the point to the jury, who said, "We are of opinion that the defendant was quite right not to pay till he knew that the superior landlord was paid." The learned judge thereupon ordered the verdict to be entered for the defendant.

Skee, Serjt., now moved for a new trial, on the ground that the point left to the jury was matter of decision for the judge, and that the finding by the jury did not warrant the verdict entered for the defendant. It is submitted that the evidence of the attorney clearly proved a disclaimer, and the learned judge should have so directed the jury. In *Doe dem. Calvert* v. *Frowd* (*a*), a letter written by the defendant (who had held under a

(*a*) 4 *Bingh.* 557., 1 *Moore & P.* 480.

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devisee for life, upon whose death rent was demanded by the heir-at-law of the devisor)—stating that he held as tenant to *Smallpiece* (to whom the deceased tenant for life had been married), and that he had not, up to that time, considered the claimant as the landlord of the house; that he should be ready to pay the arrears to any person proved to be heir-at-law; but that he must decline taking upon himself to decide the claim without more satisfactory proof;—was held to amount to a disclaimer. *Best* C. J. there observes, "When the lessor of the plaintiff demands his rent, the defendant says, 'I will not pay; I am tenant to *Smallpiece*;' and at the trial puts the lessor of the plaintiff to prove his title. If this be not disclaimer, what is? But I should not have thought differently, even if this case had been exactly like the case of *Doe dem. Williams* v. *Pasquali* (*a*), because a notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy, there can be no necessity to end that which he says has no existence." [*Tindal* C. J. In *Doe dem. Calvert* v. *Frowd*, there was no tenancy at all; the estate of the tenant for life had determined by her death, and there was no necessity for a disclaimer. There are authorities to shew that a tenant, honestly enquiring into the title of a claimant, is not thereby guilty of a disclaimer.] In the case cited, the court assumed that a tenancy existed; and although there was no distinct denial of the claimant's title, the chief justice considered that the fact of the party's refusing to pay rent, and putting the claimant to prove his title, amounted to a disclaimer. So here, the defendant refuses to pay rent, and compels the lessors of the plaintiff to make out their right to recover. In *Doe dem. Gray* v. *Stanion* (*b*), where all the previous cases were considered, it was held there was no

(*a*) *Peake, N. P. C.* 196.

(*b*) *Tyrwh. & G.* 1065., 1 *Mees. & W.* 695.

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disclaimer; but it was also held that a verbal disclaimer is sufficient, and that there would have been a disclaimer in that case, if the defendant had claimed to hold possession upon a ground inconsistent with the relation of landlord and tenant. Here there was a tenancy from year to year, and that which passed between the attorney for the lessors of the plaintiff and the defendant, was clearly inconsistent with his standing in the relation of tenant to them. In *Doe dem. Whitehead* v. *Pittman* (*a*), the words used by the tenant to the landlord, "I have no rent for you; *A. B.* has ordered me to pay none," were held to be evidence of a disclaimer. Here the defendant, by the expression, "I am prepared to spend a little money about it," shews that it is his intention to dispute the title of the lessors of the plaintiff to the uttermost. [*Tindal* C. J. Does what passed amount to any thing more than a mere difference of opinion with respect to the agreement, the tenant giving one construction to it and the landlord another. All that the tenant says, upon an equivocal agreement, is, that at any rate he has a lease for seven years, and a right to have a lease for the residue of the original term. Do you say that it is a renunciation, for a tenant holding from year to year to claim to hold for seven years?] That is the effect of *Doe dem. Gray* v. *Stanion.*

TINDAL C. J. It appears to me that this case was properly left to the jury, and that they were justified in finding that there was no disclaimer by the defendant. A disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself. The facts of this case support neither of these views. The defendant asserts no title in himself; he

(*a*) 2 *Nev. & Mann.* 673.

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merely says, "I hold under *Hillier*, and was directed by him to pay *Kent*, and I'll do so; for how do I know he may not come and make a demand upon me?" By the terms of the agreement with *Hillier*, which was made prior to the title of the lessors of the plaintiff to the premises, which only commenced in 1837, the rent is to be paid on the same day that *Hillier* has to pay his rent; and the defendant says, in effect, that he is ready to pay his rent as soon as he knows that *Hillier* has satisfied *Kent*. It does not seem to me that there has been any renunciation of the tenancy by the defendant, but that he has merely insisted on standing upon the terms of the agreement. I therefore think, that there was no disclaimer, and consequently that the lessors of the plaintiff having given no notice to quit, were not entitled to recover possession of the premises.

Bosanquet J. The question for our consideration is, not whether the conversation between the attorney of the lessors of the plaintiff and the defendant was evidence of, but whether under the circumstances it amounted to, a disclaimer. It has been contended that it does upon two grounds: first, because the defendant refused to pay rent to the lessors of the plaintiff, the assignees of *Hillier;* and, secondly, because he insisted on his right to hold the premises for seven years, or for the three lives named in the original lease. It is material to look at the circumstances under which the conversation took place, to see whether the defendant meant to disclaim the title of the lessors of the plaintiff. It appears that, in 1833, *Hillier* let the premises to the defendant at a yearly rent, with an agreement to grant him "a lease for seven years, or for the lease for lives under which he holds the property." It further appears, that *Hillier* had told the defendant to pay his rent to *Kent*, and according to the agreement he was not to be

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called upon to pay the rent until *Hillier* paid his to *Kent*. When, therefore, the lessors of the plaintiff ask him for the rent, he wishes to know if *Kent* the superior landlord has been satisfied. Then, when immediate possession was demanded, the defendant says, "I hold on lives, and as long as they live I will hold the premises. * * * you know I have an agreement." He certainly had not a lease, but only an agreement for a lease, which gave him an equitable interest. But what he says is in effect this, "I have an equitable right to hold possession, and I shall insist upon doing so." It does not appear to me that this is a disclaimer of the title of the lessors of the plaintiff.

ERSKINE J. I am of the same opinion. Whether or not the conversation between the attorney for the lessors of the plaintiff and the defendant amounted to a denial of their title, was a question of fact for the jury; and it does not appear to me that the jury were wrong in finding that there was no denial of title, but merely a refusal to pay rent until the superior landlord was satisfied. A good deal of confusion has arisen from mixing up the two parts of the case. The attorney did not go at first to demand rent, but to demand possession, and it was in answer to the latter demand that the tenant said, he held a lease for lives. He was justified in saying this; for, though only a tenant from year to year, he had a right to call on the landlord for a lease. Upon his setting up the agreement, the attorney, laying aside the demand of possession, demands the rent. Whereupon the tenant, not at all disputing the title of the lessors of the plaintiff, says, that *Hillier* desired him to pay the rent to the superior landlord, and that he should do so. It seems to me that the facts warranted the finding of the jury, and that there was no disclaimer.

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COLTMAN J. It appeared to me at the trial that there was no disclaimer by the defendant, although there was some evidence of a disclaimer to go to the jury. The agreement under which the defendant held was consistent with the title of the lessors of the plaintiff. The defendant may not have construed the agreement correctly, but he certainly had a right to a further lease, and in asserting that right, he did not in reality deny the title of the lessors of the plaintiff. With respect to his refusing to pay rent, a refusal to do so, is not in itself a disclaimer, although it may be evidence of a disclaimer. Here the tenant wished to be secured from being called upon to pay his rent over again to the superior landlord: he may not have been justified in refusing to pay until *Kent* was satisfied, but what passed clearly did not amount to a disclaimer.

Rule refused. (*a*)

(*a*) And see further, as to disclaimer, *F. N. B.* 179 K.; *Throgmorton* v. *Whelpdale*, *Bull. N. P.* 96.; *Doe d. Foster* v. *Williams*, *Cowper*, 621, 622.; *Atkyns* v. *Lord Willoughby*, 2 *Anstruther*, 397.; *Lumley* v. *Hodgson*, 16 *East*, 99.; *Bushby* v. *Dixon*, 3 *Barn. & Cresw.* 298. 302.; *Doe d. Grubb* v. *Grubb*, 10 *Barn. & Cresw.* 816.; *Doe d. Clun* v. *Clark*, *Peake*, *Add. Cases*, 239.; *Doe d. Dillon* v. *Parker*, *Gow*, *N. P. C.* 180.; *Doe d. Whittock* v. *Jefferies*, *Ibid.* 195.; *Doe d. Whitehead* v. *Pittman*, 2 *Nev. & Mann.* 673.; *Doe d. Lewis* v. *Cawdor*, 1 *Crompt. Mees. & Rosc.* 398.; *Doe d. Ellerbrock* v. *Flynn*, *ib.* 137.; *Doe d. Mee* v. *Litherland*, 6 *Nev. & Mann.* 313., 4 *Ad. & Ellis*, 784.; *Coote*, *Law of Landlord & Tenant*, 348. 375.; 4 *Nev. & Mann.* 29. *n.*

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BRISTOWE *v.* FAIRCLOUGH.

May 1.

ASSUMPSIT. The declaration stated that, before the making of the agreement thereinafter mentioned, to wit, on the 1st *April* 1836, the plaintiff had mortgaged unto certain persons called the Misses *Thompson*, certain property of the plaintiff, situate in *Mill Street, Liverpool*, for securing the repayment of 2000*l.* with interest, after the rate of 4*l.* 10*s.* per cent. per annum, and the said mortgage had not, at the time of the making of the same agreement, been redeemed; that before and at the time of the making of the same agreement, to wit, on the 25th *April* 1836, the plaintiff and defendant were in partnership together as attorneys and solicitors, and being such partners, it was thereupon afterwards, to wit, on the 25th *April* 1836, by a certain agreement entered into between them, agreed that the plaintiff should give up to the defendant the said business so carried on between the plaintiff and defendant, and all benefit and advantage arising therefrom, and also all outstanding debts, &c.; "*in consideration of receiving the note of the defendant for* 730*l.*, *payable by instalments*

The plaintiff and the defendant agreed that the former should give up to the latter a business which they had carried on in partnership, in consideration of the plaintiff's receiving from the defendant a promissory note for 730*l.* payable by instalments; and it was further agreed that in case a certain mortgage of 2000*l.* on the plaintiff's property should be called in before the note should be paid off, the defendant should immediately pay the balance remaining due on the note, or find a like mortgage, free of expense to the plaintiff.

The plaintiff (after the mortgagees had called in the mortgage, but before the same was paid off) brought an action in the Exchequer on the agreement, alleging for breach the non-delivery of the note, which action terminated under a judge's order, by the defendant's giving the plaintiff (among other things) a note for 505*l.*

The plaintiff having brought a second action in this court upon the agreement, in which the breach assigned was, that although the mortgage money had been called in, the defendant had neither paid the balance due to him nor provided a fresh mortgage, whereby the plaintiff had been put to great expense in procuring the loan from other parties. Held, that a plea which set up the recovers in the former action afforded no answer to the declaration, the former action having been brought for a different breach of the agreement.

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of 90*l. per annum, in discharge of the interest of the said Misses* Thompson's *said mortgage on the plaintiff's said property; and that, in case that sum, to wit, the amount of the said mortgage money, should be called in before the said note of the defendant should be paid off, the balance remaining due on the said note should be immediately paid, or the defendant should find a like sum at the same rate of interest free of expense to the plaintiff.*" The declaration then set out other parts of the said agreement not material to be stated; and after alleging mutual promises, and that the plaintiff had always performed and fulfilled all things in the agreement contained on his part to be performed and fulfilled, averred by way of breach, — that although the defendant did, after the making of the agreement and promise, to wit, on the 26th *April* 1836, in part execution thereof on the part of him the defendant, pay unto the plaintiff parcel of the sum of 730*l.*, for which the note of the defendant was to be given to the plaintiff as in the agreement mentioned, and did afterwards, to wit, on the day and year aforesaid, give to the plaintiff the note of the defendant, for the residue of the said sum of 730*l.*, to wit, for 505*l.*; and although, long before the note so given as aforesaid by the defendant to the plaintiff was paid off, to wit, whilst a large balance, to wit, the sum of 505*l.*, was due thereupon from the defendant to the plaintiff, to wit, on the 24th *May* 1838, the said Misses *Thompson* did call in their said mortgage, and did require the plaintiff to repay them the amount thereof; and although, by reason and in consequence of such notice, the plaintiff was obliged and bound, and expected to pay the said amount of the said mortgage money so called in and required to be paid by him as aforesaid on a certain day thereafter, to wit, on the 10th *October* 1838; of all which premises the defendant before and at the time of the making of the request thereinafter in that behalf mentioned, to wit, on,

&c., had notice; and although, at the time of the making of the request thereinafter mentioned, to wit, on the day and year thereinafter in that behalf mentioned, and when the time arrived at which the plaintiff was obliged and bound, and expected to pay the said Misses *Thompson* in the manner thereinbefore mentioned, the amount of the said mortgage money so called in and required to be paid as aforesaid, to wit, on the day and year thereinafter in that behalf mentioned, a large portion of the balance so as aforesaid due to the plaintiff upon the said note, to wit, the sum of 405*l.* remained due and unpaid to the plaintiff; and although, whilst the defendant had notice and knowledge that the said Misses *Thompson* had so called in their mortgage money, and required the plaintiff to repay the amount thereof, and that the plaintiff was obliged, and bound, and expected to pay the same in the manner and at the time thereinbefore mentioned; and whilst the before-mentioned portion of the before-mentioned balance remained due to the plaintiff upon the said note, and before the commencement of this suit, to wit, on the 7th of *June* 1838, the plaintiff requested of the defendant that he would either pay to the plaintiff the aforesaid portion of the aforesaid balance, which at the time of the making of such request, remained due to the plaintiff on the said note as aforesaid, to wit, the aforesaid sum of 405*l.*, or that the defendant would find or provide for the plaintiff the loan of a sum of money of amount equal to the amount of the said Misses *Thompson*'s mortgage money so called in, &c., to wit, a loan of the sum of 2000*l.*, according to the true intent of the said agreement and promise of the defendant in that behalf: yet the defendant, not regarding, &c., had not paid the aforesaid portion of the said balance, or found or provided a loan for the plaintiff; by reason whereof the plaintiff was obliged to procure from certain other persons a loan of

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2000*l.*, and had paid to one *N.*, an attorney, for his charges in procuring the said loan, 200*l.*, and had incurred personal and other expenses, &c.

Plea, — that after the making of the supposed promises, and before the commencement of this suit, to wit, on the 1st of *January* 1838, in the court of our Lady the Queen of her Exchequer at *Westminster*, before the barons of the said court, the plaintiff impleaded the defendant in an action on promises, and there pleaded and declared against the defendant in the said action, amongst other things, that whereas before the commencement of that suit, to wit, on the 25th of *April* 1836, by a certain agreement in writing then entered into between the plaintiff and the defendant, it was agreed between the plaintiff and the defendant in the words and in the manner following, that is to say, &c., [setting out the agreement now declared upon, and assigning for breach, that the defendant broke his promise in not giving the plaintiff a note for 730*l.*, and although he afterwards paid him 285*l.*, he would not give him a note for the balance, to wit, for 505*l.*] That afterwards, to wit, on the 22d of *February* 1838, by a certain order in the said action then made by one of the barons of the said court, it was ordered, that upon payment of the costs of the action to be taxed, all further proceedings therein should be stayed; that the defendant should hand over to the plaintiff a note for the payment of 505*l.*, by instalments of 90*l.* yearly, and should assign to the plaintiff a certain policy of insurance by way of security; and that it should be referred to the master of the said court to ascertain what other damages, if any, the plaintiff had sustained; that under, and in pursuance of the said order, the costs of the said action were afterwards, to wit, on, &c., taxed and paid, and the promissory note and policy handed over and assigned, and that under and by virtue of the said order, it was

referred to the master of the said court to ascertain what other damages, if any, the plaintiff had sustained, and that the master, after taking on himself the burthen of the said reference, and after due examination in that behalf afterwards, to wit, on, &c., duly ascertained and certified that the plaintiff had sustained no other damages; and that the plaintiff afterwards, to wit, on &c., accepted and received of and from the defendant the said costs, the last-mentioned note, the assignment of the said policy, under and in pursuance of the said order, and in lieu and satisfaction and discharge of the said damages and causes of action in that declaration mentioned, and thereupon then stayed all proceedings in the same action, and the same have continued so stayed, to wit, hitherto. That before the said action in which the said order was made had been commenced, and before the plaintiff had declared therein as aforesaid, to wit, on the 28th *September* 1837, the said Misses *Thompson* did call in their mortgage money, and did require the plaintiff to repay them the amount thereof on a certain day then following, to wit, on the 30th *March* 1838, of which the plaintiff, before and at the time of the commencement of the same action and declaring therein as aforesaid, had notice. The plea concluded by averring the identity of the agreement, and the mutual promises mentioned in the declarations in the two actions; the identity of the note for 505*l.* mentioned in the present declaration with the note in the plea; and also that the calling in of the mortgage money in the present declaration mentioned was a continuation and repetition of the said calling in mentioned in the plea, "the same having been permitted by the said Misses *Thompson* to stand over for the indulgence of the plaintiff." Verification.

Replication,—that although it is true that the mutual

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promises in the declaration in this action mentioned are the same as the mutual promises in the declaration in which the said order in the plea mentioned was made, yet the plaintiff issued his writ in this action and declared thereupon, not for the recovery of damages for the breaches of promise, for the purpose of compensating, and satisfying, and ascertaining which and touching which the said order in the plea mentioned was made, nor for any of such damages, nor in respect of any of such breaches, but for the recovery of damages for another breach, to wit, the breach by the defendant in the manner and form by the plaintiff above assigned of the promise above, and also in the declaration in the action in which the said order was made mentioned. Verification.

Special demurrer, assigning for causes — that the said replication neither denies or traverses any matter of fact contained in the said plea, nor confesses and avoids the same plea; and that the same replication is not a good new assignment, and merely repeats the facts contained in the previous pleadings, and does not shew how the breach in the replication mentioned as another breach, is another and different breach from the said breaches for the purpose of compensating, and satisfying, and ascertaining which, and touching which the order in the plea mentioned was made, as alleged in the replication, save as appears by the previous pleadings in this suit; and that it does not aver or shew that the causes of action in this suit, or any of them, are or is other and different from the causes of action in the said suit in the plea mentioned contained; and that the replication attempts to put in issue to be tried by the country, mere inference and matter of law, to wit, whether or not the plaintiff can recover in this suit, after the proceedings in the former action in the plea mentioned, under facts and circumstances which are

admitted and agreed upon between the plaintiff and defendant; and that the replication is argumentative, and no certain and sufficient issue can be taken thereon, &c. Joinder in demurrer.

Cowling, in support of the demurrer. The replication is bad: it contains no traverse; and although it confesses it does not avoid the plea. But in reality it amounts to a demurrer, and if so it is bad, as concluding with a verification. If it was intended to be in the nature of a new assignment it is also bad; for it contains no facts not stated in the plea. Where the declaration is special the plaintiff should either deny the plea or demur. He cannot new assign where the declaration states material facts which may be traversed. In *Cocker* v. *Crompton* (*a*), it was held that where a plaintiff in trespass *quare clausum fregit*, names the close in his declaration, and the defendant pleads *liberum tenementum* generally, without giving any further description of the close; the plaintiff is not driven to a new assignment, but is entitled to recover upon proving a trespass done in a close in his possession bearing the name given in the declaration, although the defendant may have a close in the same parish, known by the same name. [*Maule* J. Supposing your plea to aver that the causes of action are the same, it states, in effect, that the breach of promise complained of is the same as in the former action.] The plea merely states facts, from which it calls upon the court to draw the inference that the present action is for the same breach. If the plea sets out facts which are insufficient to meet the declaration, the defendant should have demurred; as it is, the facts remain uncontradicted. [*Tindal* C. J. You must not assume the

(*a*) 1 *B. & C.* 489.; 2 *D. & R.* 719.; and see *Cooke* v. *Jackson*, 9 *D. & R.* 495.; *Tapley* v. *Wainwright*, 5 *B. & Ad.* 395., 2 *N. & M.* 697.; *Lempriere* v. *Humphry*, 4 *N. & M.* 638.

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replication is bad because the plea is bad, and then step back and make out the plea to be good.]

At any rate the declaration is bad. It does not aver that the note for 730*l.* was given, and that the mortgage money was afterwards called in, and the defendant was required to find other money. But it appears that the agreement was never acted upon; that the note was not given; but the defendant paid the plaintiff 225*l.*, and gave him a note for 505*l.*; and it is not alleged that the latter note was payable by instalments. Neither does it appear, upon such note being given, that any arrangement was made to pay it when the mortgage money was called in. If the plaintiff meant to insist that the parties agreed that the old arrangement should continue, he should have declared upon such new agreement; for the former was only applicable to the specific note for 730*l.*, and the promise to pay the balance when the mortgage money was called in depended upon that note being given. If the understanding had originally been that the plaintiff should have power to demand payment of the note at any time, it would have been made payable by instalments. With respect to the plea, it is a good answer to the declaration. Both the present and the former action have been brought on the same agreement, and the damages sustained might have been recovered in such former action. The recovery, therefore, in that action is a bar to the present demand; *Fetter* v. *Beale* (*a*), *Howell* v. *Young* (*b*), *Dicas* v. *Jay* (*c*). *Pritchet* v. *Boevey* (*d*) shews that a party may recover special damage which he has not paid, but which he is liable to pay. So here, as the plaintiff was liable at the time of the former action, on the mortgage money being called in to find other money, the defendant might then

(*a*) 1 *Salk.* 11.
(*b*) 5 *B. & C.* 259.
(*c*) 6 *Bingh.* 519.; 4 *M. & P.* 285.
(*d*) 1 *C. & M.* 775.

have recovered the costs he would have to pay another attorney for procuring him a loan of equal amount.

Fitzherbert, contrà. If it had been shewn in the plea that this cause of action had accrued before the commencement of the former suit, the plaintiff would have been barred; but it does not so appear either expressly or by necessary inference. The former action was brought for not giving the note for 730*l.* The present declaration does not complain of the note not being given, but alleges a different breach of the agreement in not paying the balance and finding the plaintiff another loan. The plea only applies to the not giving of the note; but does not answer the breach now alleged. With respect to the time for payment of the balance, the argument on the other side goes to this length — that because the note for 730*l.* was not given pursuant to the agreement, the defendant is not bound to pay the balance at all. The agreement, in substance, was, that if the mortgage money was called in before all the instalments were payable, the defendant should either pay off the balance immediately, or provide other mortgage money; and the breach in the present declaration is, that he did neither. The authorities shew that if the event fixed for the time of payment never takes place, and there are other circumstances in the case from which the time can be ascertained, it is to be taken from them; *Fragano* v. *Long* (*a*), *Alexander* v. *Gardner.* (*b*) Here, although the defendant has rendered the observance of one part of the agreement impossible, he is bound to perform the rest; for he is not to take advantage of his own default.

Cowling, in reply. It is argued that the mode in which the 730*l.* were to be paid was collateral to the agree-

(*a*) 4 *B.* & *C.* 219.; 6 *D.* & *R.* 283.

(*b*) 1 *New Cases*, 671.; 1 *Scott*, 630.

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ment. If that be so, the declaration should have averred that the plaintiff gave up business in consideration of 730*l.*, to be paid to him by the defendant. But, on the contrary, it makes the arrangement between the parties dependent upon the note being given. There was a good reason for requiring a note in preference to allowing the payment of the 730*l.* to rest on a mere agreement, inasmuch as the note was a negotiable instrument. *Fragano* v. *Long* and *Alexander* v. *Gardner* have little bearing on the present case. In *Alexander* v. *Gardner* the plaintiff declared on the new contract implied by law, and not upon the old contract. Here the plaintiff seeks to recover on the original agreement after part of it has been performed, and a new arrangement made with respect to the residue of the contract.

TINDAL C. J. This action is brought upon an agreement entered into between the plaintiff and the defendant; and the substance of such agreement is, that in consideration of the plaintiff's giving up to the defendant a business which they had carried on in partnership, the defendant would give to the plaintiff a note for 730*l.*, payable by instalments of 90*l.* per annum in discharge of the interest upon a mortgage of certain premises belonging to the plaintiff; and that in case the mortgage money should be called in before the note should be paid off, the balance should be immediately paid, or the defendant should find a like sum at the same rate of interest, free of expense to the plaintiff. Two things are stipulated by the agreement to be done, the one immediate, namely, the giving of the note, and the other executory, and depending upon the calling in of the mortgage money. The plaintiff, it seems, brought an action in the Court of Exchequer upon the agreement, in which the breach assigned was the not giving the note for 730*l.*; and it appears that an order was

made in that action, whereby the defendant was directed to give to the plaintiff a note for 505*l.* In the present action a second and a different breach is alleged, namely, that although the mortgage money had been called in, the defendant had neither paid the balance, nor obtained another loan for the plaintiff. The answer set up by the plea is, that the present action is brought upon the same agreement, and to recover the same damages as the suit in the Exchequer. The plaintiff replies, that although it is true that the action is on the same agreement, yet he does not sue for the same breach, but for another and different breach. It seems to me that this is a good answer to the plea, which *primâ facie* would lead the plaintiff to suppose that it alleged that he was suing for the same cause of action. With respect to the plea, it affords no answer to the declaration, for the order made in the Exchequer does not prevent the plaintiff, when a new and distinct cause of action arises upon the agreement, from putting it in suit. The present breach could not be sued for in the former action, as it has been occasioned subsequently by the calling in of the mortgage money. I therefore think that in respect of this breach the plaintiff is entitled to judgment.

BOSANQUET J. The question is, whether this action is brought for the same cause of action as that sued for in the court of Exchequer. The subject matter of this action seems to me to be different from that complained of in the former action, and consequently the answer set up by the defendant is not sufficient.

ERSKINE J. It appears to me that the declaration is good, and that the plea affords no answer to it. The declaration sets out the agreement between the parties, by which the defendant is to give the plaintiff a note for

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730*l.*, to be paid by instalments; but although made so payable, in the event of the mortgage money being called in, the balance is to be paid at once, or the defendant is to find the plaintiff an equivalent mortgage. It is said that the declaration is bad, because it discloses that the original note was not given, but another note for a different amount; but that variation from the terms of the agreement seems to me not material with respect to the breach now alleged. In consequence of the defendant having failed to give the note for 730*l.*, the plaintiff afterwards took a note for 505*l.*, but it does not appear to me that the taking of the latter note prevents the plaintiff from suing on another branch of the agreement. I think, therefore, that the plaintiff is entitled to recover, unless the plea contains a sufficient answer. Now the plea shews that a former action was brought upon the agreement, but not upon the same breach. It is not pretended that the 730*l.* were recovered in the Exchequer, but it appears that an arrangement was come to, by which the question of damages for not giving the note for 730*l.* was referred to the Master, and another note was given for the balance. As the plea, therefore, shews that the former action was not for the same breach, it is not sufficient, and consequently it is unnecessary to say any thing with regard to the replication.

MAULE J. I am likewise of opinion that this declaration is good. It is averred in the replication that the former action was in respect of another and a different breach, and that is a sufficient allegation by way of new assignment.

Judgment for the plaintiff.

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BATTLEY *v.* LEWIS, (sued with BAILEY and POTTER).

May 13.

DEBT for 60*l.*, viz., 30*l.* for goods sold and delivered, and 30*l.* on an account stated. Plea, by defendant *Lewis*, *nunquam indebitatus*, as to all but five pounds five shillings, and, to that sum, a tender. The replication admitted the tender. The other two defendants suffered judgment by default.

At the trial before the sheriff of *Middlesex*, in *February* last, the delivery of goods to the amount of 7*l.* 11*s.* 4*d.* between the 3d and 12th *January*, and to the amount of 1*l.* on the 17th, and 4*l.* or 5*l.* on the 26th of *January* was proved, and the question was, whether, at the time of the first delivery, the defendant *Lewis* was a partner with *Bailey* and *Potter*, who have since become bankrupts; *Martin*, for *Lewis*, contending that up to the 18th of *January*, the partnership had not been entered into, but was merely a subject of negotiation, the partnership deed, though dated the 1st of *January*, not having been executed till the 18th. In order to shew that the partnership was complete before the execution of the deed, the plaintiff gave in evidence, an affidavit, sworn by *Lewis* on the 12th *March* 1838, in support of a motion for an injunction to restrain *Bailey* and *Potter* from using the partnership name to bills, &c., wherein it was stated that, in *June* 1837, *Bailey* and *Potter* having agreed to dissolve their partnership with one *Clift* in the business of wholesale druggists, applied to *Lewis* to enter into partnership with them in that business, and that after some negotiation upon the subject, *Lewis* agreed to enter into partnership with them from the 1st day of *January* 1838, upon the terms and conditions

A. and *B.* agree to become partners from a subsequent day, upon certain terms which are to be embodied in a deed to be executed on such subsequent day. The deed is executed on a day later than that appointed. *B.* is bound by the contract of *A.*, entered into in the name of the firm between the day appointed for the execution of the deed and that on which it was actually executed.

So, though alterations are introduced into the deed at the time of its execution.

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mentioned and contained in a certain indenture of partnership, bearing date 1st of *January* 1838. That although the said articles were not executed until the 18th of *January*, yet that, pursuant to the terms of the said indenture, *Bailey*, *Potter*, and *Lewis* were considered as commencing and carrying on the said business in partnership from the said 1st day of *January* 1838, and the said business had, ever since that time, been carried on by *Bailey*, *Potter*, and *Lewis*, in partnership together, under the firm of *Bailey*, *Potter*, and Co., that the said partnership business has, since the 1st day of *January* 1838, been wholly conducted and managed by *Bailey* and *Potter*, and that *Lewis* has not attended to or taken any part in the management of the said business, according to the liberty to that effect given to him by the indenture of partnership. Upon the authority of *Vere* v. *Ashby* (*a*), the undersheriff nonsuited the plaintiff, giving him leave to move to enter a verdict for 7*l.* 9*s.* 4*d.*, if the court should be of opinion that *Lewis* was liable as a partner from the 1st of *January*; and it was agreed that the court should be at liberty to draw the same inferences which a jury might have drawn.

April 22. *Bompas*, Serjt. now moved accordingly. Although the partnership deed was not signed till the 18th, yet, at the time the goods were delivered, the business was carried on in the name of the new partnership, under an arrangement entered into before the 1st of *January* 1838. It must be admitted that the success of this motion will depend upon distinguishing this case from *Vere* and *Ashby*. There *Shaw* agreed, on the 24th of *June*, to become a partner with *Ashby* and *Rowland*, that the name of the firm should not be changed, and that the partnership should be considered as commencing as

(*a*) 10 *Barn. & Cress.* 288.

from the 18th of *May*. On the 21st of *May*, *Rowland* discounted a bill for 48*l*. 17*s*. 4*d*., which he indorsed in the partnership name, to the plaintiffs, and applied the proceeds to his own use. The court held that the plaintiffs could not recover this sum of 48*l*. 17*s*. 4*d*. in an action against *Ashby*, *Rowland*, and *Shaw*, jointly. The difference between the two cases is this, — there the agreement was retrospective, here it was prospective.

Rule *nisi* granted.

Channell, Serjt., now shewed cause. Although the partnership deed is dated on the 1st of *January* 1838, it was not executed until the 18th, which is subsequent to the period at which the goods in question were sold by the plaintiff. But they were considered as carrying on business as from 1st of *January*. This brings the case directly within the authority of *Vere* v. *Ashby*. *Bailey* and *Potter* had an authority to pledge the credit of *Lewis* before he had executed the deed.

Bompas, Serjt., *contrà*, was stopped by the court.

TINDAL C. J. The distinction between the case which has been cited and the present is this: — In *Vere* v. *Ashby*, it was entered into on the 24th of *June* 1826, and was intended to have a by-gone operation. A certain bill had been discounted in the time intervening between the 18th of *May* and the 24th of *June* for the firm, and other bills were discounted subsequent to *June*. It was held, that the new partner was liable in respect of the bills discounted after the 24th of *June*, and not upon that discounted before that day, when he was not, in fact, a partner. Here there is an agreement for a partnership antecedent to the 1st of *January*, though, for some reason, the partnership deed is not executed on that day. This would almost of itself be sufficient to

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make them partners from the 1st of *January*. But in addition to this, the affidavit states that the defendants acted as partners from the 1st of *January*. I therefore think that the action was properly brought against the three.

BOSANQUET J. If the obligation to account as partners had depended upon the deed of partnership, the creditors would not have been at liberty to treat *Lewis* as a partner, except from the time at which he executed the deed. That was *Vere* v. *Ashby*. Here, by an understanding come to before the 1st of *January*, *Lewis* was to become a partner from that day. Suppose no deed had ever been executed, each partner would have been liable for the engagements of the firm entered into whilst the business was carrying on for their mutual benefit. It was a question of fact, how the business was carried on, and as it appears to have been carried on by the three as partners, all were liable to be sued.

COLTMAN J. The question in this case is, whether a partnership subsisted among these parties between the 1st and the 18th of *January*. If, at that time, there was an agreement between them to be partners from the 1st of *January*, although the deed was not executed, the partnership relation would nevertheless exist. Some slight modifications appear to have been introduced into the deed before it was executed; but even if material alterations had been introduced into the deed at the time of its execution, that circumstance would not have altered the previous position of the parties.

ERSKINE J. The defendant's liability does not depend upon any retrospective operation sought to be given to the partnership deed as in *Vere* v. *Ashby*, but upon the preceding agreement. The affidavit shews

that the parties had entered into an agreement to become partners from the 1st of *January*, upon terms which were afterwards embodied in the deed. Under these circumstances, and upon the principle of *Vere* v. *Ashby*, I think that *Bailey* and *Potter* had authority to pledge the credit of *Lewis* in matters relating to the partnership.

Rule absolute.

HUTHWAITE, Administrator of TIMOTHY DRISCOLL, deceased, *v.* PHAIRE.

To an action of covenant brought by the plaintiff, as administrator of *D.*, by virtue of letters of administration granted to him by the Archbishop of *Dublin*, upon a deed of separation, whereby the defendant covenanted to pay his wife an annuity, which he likewise charged upon certain estates in *Ireland*, the defendant (who was under terms to plead issuably) pleaded that *D.*, at the time of his death, was an inhabitant of, and commorant within, the city of *Dublin*, and had *bona notabilia* within the diocese of the Bishop of *London*. Held, that the plea was not issuable, it not shewing that at *D.*'s decease, the deed sued on was within the diocese of *London*.

THIS was an action of covenant brought by the plaintiff, as administrator of *Timothy Driscoll*, deceased, against the defendant, upon a deed of separation, whereby the defendant covenanted with *Driscoll* to pay to his, the defendant's wife, an annuity, which he likewise charged upon certain estates situate in *Ireland*. The declaration, after setting out the indenture, and assigning a breach of the defendant's covenant to pay the annuity, concluded with the following profert.

And the plaintiff brings into court here the letters of administration of all and singular the goods, rights, credits, and chattels of the said *Timothy Driscoll* deceased, as of a person dying intestate, limited for the special purpose of executing the trusts of the said indenture, and which said letters of administration so limited for the purpose aforesaid were, after the death

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of the said *Timothy Driscoll*, to wit, on the 9th day of *March* 1839, granted to the plaintiff by *John George*, by Divine Providence Archbishop of *Armagh*, Primate and Metropolitan of all *Ireland*, in due form of law; and which letters of administration give sufficient evidence to the court here of the grant of administration to the plaintiff as aforesaid, for the purpose aforesaid, the date whereof is the day and year last aforesaid: With this, — that the plaintiff will verify, that the said *Wexford* estates, and the said messuages, tenements, lands, and hereditaments by the indenture so charged as aforesaid, are situate in the kingdom of *Ireland*.

The defendant, who was under terms to plead issuably, obtained an order from Mr. Justice *Maule*, (which was afterwards made a rule of court) to plead, first, *non est factum;* and, secondly, the following plea: —

And for a further plea, &c., the defendant says that the said *T. Driscoll* was, before and at the time of his death, an inhabitant of, and commorant within, the city of *Dublin*, in that part of the United Kingdom of *Great Britain* and *Ireland* called *Ireland*, and that the said *T. Driscoll* in his lifetime, and at the time of his death, had divers goods and chattels, rights and credits, which were *bona notabilia* in the diocese of the Bishop of *London*, in that part of the said United Kingdom called *England*, that is to say, goods and chattels, rights and credits, of the value, to wit, of 1000*l.* and upwards, within the said diocese; and by reason thereof the said letters of administration are void and of no effect in law to the plaintiff. Verification.

Hurlstone having, in *Hilary* term last, obtained a rule to shew cause why the rule to plead several matters, and the order of Mr. Justice *Maule* therein mentioned,

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should not be discharged, on the ground that the second plea was not an issuable plea;

Merewether Serjt. and *F. V. Lee* now shewed cause. The second plea is clearly issuable, and goes to the merits of the action within the meaning of the recent decisions in this court: *Staples* v. *Holdsworth* (*a*), *Wettenhall* v. *Graham* (*b*), *Willis* v. *Allen* (*c*). It disputes the right of the plaintiff to sue in this country, alleging that *Driscoll*, at the time of his death, had *bona notabilia* in the diocese of *London*, by reason whereof the letters of administration granted to the plaintiff in *Ireland* are void. [*Tindal* C. J. That is rather a *non sequitur*.] It is clear, on general principles, that an administration granted by the Primate of *Ireland* is of no effect here, and that such an administrator can neither sue nor give a proper discharge for money owing to the deceased. But, supposing the plaintiff might have maintained this action, if there had been no *bona notabilia* in this country, the fact of there being such is distinctly alleged in the plea. It is therefore necessary, in order to entitle the plaintiff to sue, that he should take out administration in the province of *Canterbury*; for otherwise administration may be granted to some other person, who may also proceed against the defendant for the present demand. The granting of administrations is altogether a matter of local jurisdiction. In *Comyns's Digest*, tit. *Administrator*, (B. 3.), it is laid down: "If a man die intestate, having *bona notabilia* in the several provinces, administration shall be granted by each archbishop for the goods in his province (*d*). If he has *bona notabilia* in *Ireland* and also in *England*, it shall be

(*a*) 4 *New Cases*, 144.; 5 *Scott*, 432.

(*b*) 4 *New Cases*, 714.; 6 *Scott*, 603.

(*c*) 5 *New Cases*, 465.; 7 *Scott*, 474.

(*d*) And see *Allison* v. *Dickenson*, *Hardres*, 216.

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granted by the Archbishop of *Dublin* for the goods in *Ireland*, and by the Archbishop of *Canterbury* for the goods in his province." It was held also in *Daniel* v. *Luker* (*a*), that if an intestate have *bona notabilia* in *England* and in *Ireland*, there shall be several administrations by the ordinary in each country for all within his province. And it is stated in *Williams on Executors*, 2d ed. p. 186. n. (u), that the deduction from the cases is, "that if there be *bona notabilia* in *England* and *Ireland* several probates shall be granted by the archbishop or bishop in *England*, and the archbishop or bishop in *Ireland*, as the case may require."

This plea is framed in accordance with the plea in *Stokes* v. *Bate* (*b*). Where a defendant insists upon letters of administration being void, he must plead that fact specially: 2 *Stark. on Evid.* 547., 1 *Williams on Executors*, 197. 2d ed. If the plea had stated that *Driscoll* resided in this country at the time of his death, it clearly would have been good; and the allegation that he left *bona notabilia* here raises the same species of defence to the action. [*Tindal* C. J. Have you any case to shew that, if the defendant were to pay this debt to the plaintiff, he could afterwards be called upon to pay it over again? If so, that would go to the merits.] No such authority can be produced, for this is in all probability the first attempt to sue in the *English* courts upon an *Irish* administration; but it is submitted, that if the defendant should pay the demand and some other party were afterwards to take out administration here and sue him for it, the defendant could not set up such payment as a defence to the action.

Stephen Serjt., and *Hurlstone*, in support of the rule. This plea is clearly not issuable, but is a frivolous plea; for both of its allegations, namely, that *Driscoll* at the

(*a*) *Dyer*, 305. *a*. (*b*) 5 *B. & C.* 491.; 8 *D. & R.* 247.

time of his death resided in *Dublin*, and that he had *bona notabilia* within the diocese of *London*, are utterly immaterial to the merits of the action. The quotation from *Comyns's Digest* is in favour of the plaintiff, for it shews that the granting of probates and administrations is entirely a matter of local jurisdiction. So in *Shaw* v. *Stoughton* (*a*), "it was said by *Hale*, and not denied, that if a man die leaving goods in the several provinces of *York* and *Canterbury*, several administrations must be committed. And so it is of goods in *England* and *Ireland*." There must consequently be an *Irish* administration in the present case, for an *English* administration would be ineffectual, inasmuch as the Archbishop of *Canterbury* has no jurisdiction in *Ireland*. If, the reasoning on the other side were correct, it would follow that this debt could not be sued for at all. The proper test to apply to this plea is, to consider whether an *English* administration is required for the protection of the defendant. It clearly is not; on the contrary, if an administrator under an *English* administration were to sue for this demand, it would be a good plea to allege that the debt was an *Irish* debt.

Many cases have occurred in which our courts have taken notice of foreign administrations. In *Currie* v. *Bircham* (*b*), where the widow of an officer who died intestate in *India*, obtained letters of administration to his effects in *Bombay*, and one of his creditors took out administration in this country; it was held that the *Indian* letters of administration prevailed over those granted in *England*. In *Jauncy* v. *Sealey* (*c*), the plaintiff, who had obtained administration to a party who died at *Naples*, filed a bill for a discovery of his personal estate. The defendant pleaded, that the deceased had made a nuncupative will, of which he left the defendant executor, who had proved the will according to the custom of the

(*a*) 2 *Lev.* 86.; 3 *Keb.* 163. (*c*) 1 *Vern.* 397.
(*b*) 1 *D. & R.* 35.

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country where the party died, and the defendant denied the deceased left any estate but what was at *Naples*. The court allowed the plea, saying, "the testator having left no estate in *England*, it was not necessary that the will should be proved here; no more than if a man died and left an estate in *Scotland*." Here, as the deed was executed in *Ireland*, the court will presume it was in that country at the time of *Driscoll*'s death; and, consequently, as all specialties are *bona notabilia* in the place where they are at the decease of the party, an *Irish* administration could alone entitle the plaintiff to sue upon it. [*Tindal* C. J. Whether there must be an *English* or an *Irish* administration in order to sue on the deed, depends upon where it was at *Driscoll*'s death. So far as any assumption can be made, the deed may be supposed still to be in *Ireland*.]

TINDAL C. J. I think upon the authority of *Comyns's Digest*, title *Administrator*, (B. 3.), referring to the 1 *Rolle's Abridgment*, 908. l. 40. (*a*), that this is not an issuable plea; it does not go to the merits of the action. It is laid down in *Comyns*, that if a man have *bona notabilia* in *Ireland* and also in *England*, administration shall be granted by the Archbishop of *Dublin* for the goods in *Ireland*, and by the Archbishop of *Canterbury* for the goods in his province. Here the plaintiff sues under the authority of an administration granted to him by the Archbishop of *Ireland*, for the special purpose

(*a*) Rolle vouches *Daniel* v. *Lucre*, *Dyer*, 305. *a.*, where *L.*, a merchant in *Ireland*, was bound in 80*l.* to *D.*, of *London*, by bond executed and kept in *England*, where *D.* died. Administration was committed in *Ireland* to *D.'s* son, who released the debt. Administration was committed in *England* to *D.'s* widow, who, getting possession of the bond, sued *L.* The court held that *L.* ought to answer the action, notwithstanding the Irish administration and the release. *S. C. Dalison*, 76., where it was said that a lease, though by deed, requires administration where the land lies, not where the deed is.

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of executing the trusts of the indenture on which the present action is brought. We must presume that what has been done is according to law, unless it be shewn to be otherwise, by the plea. In order to make out that the letters of administration were improperly granted, the defendant should have alleged in his plea that the deed on which he is sued, at the time of *Driscoll*'s decease, was *bona notabilia* within the province of *Canterbury*. The plea, however, merely states that *Driscoll*, before and at the time of his death, was an inhabitant of *Dublin*, and at his death had *bona notabilia* in the diocese of the Bishop of *London*. We therefore cannot assume that this very deed at the time of *Driscoll*'s decease was in *London*, and was *bona notabilia* there.

If it can be shewn, within a limited time, that at the time of *Driscoll*'s decease the deed was in *London*, we are inclined to allow the defendant, on payment of costs, to amend his plea, by introducing an allegation to that effect.

Hurlstone suggested that the plea so amended would still be objectionable, as being a plea in abatement; *Yeomans* v. *Bradshaw* (*a*); and, consequently, one that the defendant could not put on the record, being under terms to plead issuably; *Kilwick* v. *Marman* (*b*).

Merewether Serjt. *Yeomans* v. *Bradshaw* shews only that such a plea may be pleaded in abatement. In *Lysons* v. *Barrow* (*c*) it was pleaded in bar.

Per Curiam. (TINDAL C. J., BOSANQUET, COLTMAN, and ERSKINE Js.)

Rule to be absolute, unless the truth of the amendment suggested be verified by affidavit within a week.

(*a*) *Carth.* 373.
(*b*) 1 *Burr.* 59.
(*c*) 2 *New Cases*, 486.

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[*April* 29. THORNTON *v.* JENYNS, Clerk, and Others.

The defendants ordered, on behalf of the corporation of the *Bedford Level*, that a contract should be entered into with the plaintiff for the erection of certain coffer-dams, at the sum of 5000*l.*; that 3000*l.* should be paid to the plaintiff upon the execution of the contract, and upon an assignment of the materials required for striking the dams to the corporation, as a security for the sum so advanced, and the residue when the work was completed; "and that the registrar of the said corporation should prepare the necessary contract and assignment, to be executed by the plaintiff."

ASSUMPSIT. The first count of the declaration stated that before the making of the promise of the defendants hereinafter mentioned, to wit on the 12th of *November* 1834, the defendants, after due and mature consideration, considering it absolutely necessary for the security of the country that coffer-dams should be forthwith struck round the three old eyes of *Denver Sluice*, for the purpose of examining their actual state, ordered,

The declaration, after setting out the order, alleged that "thereupon, the said order being so made, in consideration of the premises, and also in consideration that the plaintiff *had then promised* the defendants to observe and perform all things in the said order contained, on his part and behalf to be observed and performed, the defendants *then promised* the plaintiff that all things should be observed and performed, which in the said order were contained *on the part and behalf of the said corporation*, and of them the defendants to be observed and performed." Three breaches were then assigned of the promise of the defendants: first, that the 3000*l.* had not been paid; secondly, that the defendants had not caused the contract to be prepared by the registrar, or executed by the corporation, but the corporation had refused to prepare or execute such contract; and thirdly, that the plaintiff had been prevented from erecting and completing the coffer-dams.

Held, that the first and third breaches were not well assigned, the contract never having been entered into, upon which alone the plaintiff's right to sue for those breaches could arise.

But held, with respect to the second breach, that the plaintiff was entitled to recover, the declaration disclosing a sufficient consideration for the promise of the defendants, that the corporation should enter into the contract. *Erskine* J. *dissentiente.*

Held also, that it was not a condition precedent to the right of the plaintiff to sue on that breach, that he should have tendered a contract for execution by the corporation, or have assigned to them the materials required for striking the dams.

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on behalf of a certain corporation called "The Governor, Bailiffs, and Commonalty of the Company of Conservators of the Great Level of the Fens," that a contract be entered into with the plaintiff for the erection of such coffer-dams under the plaintiff's own proposals, and the plan and specification of one *Dyson*, at the sum of 5000*l.*; and that the sum of 3000*l.*, part thereof, should be paid to the plaintiff upon the execution of the said contract, and upon an assignment of the timber, materials, and implements required for striking such dams to the said corporation, as a security for the sum so advanced; and that the remainder of the contract should be paid as soon as the engineer of the said corporation, with the concurrence of a certain committee, or any three of them, should certify the work to be properly and securely completed; that although the said contract included the charge of erecting a temporary bridge, yet as the same might not be eventually necessary if the said corporation were not required to re-erect all or part of the old eyes, in such event a sum should be deducted from the said contract money equal to the costs of erecting such bridge and the use of the materials, such sum to be settled by the plaintiff and the engineer of the said corporation for the time being; and in the event of the plaintiff and the said engineer disagreeing, then by two persons to be mutually chosen by the plaintiff and such engineer, with power for such two persons to appoint an umpire, and the contract to contain a proviso that the materials required for such bridge should not be removed until it should be ascertained by the examination of the three old eyes whether such temporary bridge would be required or not; that as soon as the proposed dam should be completed and the examination taken place, the said corporation should have the offer of purchasing the materials of which the dam was composed, and such implements and working tools as

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might be required belonging to the plaintiff, at a fair valuation, to be made in the same way as the value of the temporary bridge was directed to be ascertained; *and that the registrar of the said corporation should prepare the necessary contract and assignment, to be executed by the plaintiff.* And *thereupon*, the said order being so made, in consideration of the premises, and also in consideration that the plaintiff *had then promised* the defendants to observe and perform all things in the said order contained on his part and behalf to be observed and performed, the defendants *then promised* the plaintiff that all things should be observed and performed which in the said order were contained *on the part and behalf of the said corporation* and of them the defendants to be observed and performed. And the plaintiff says, that from the time of the making of the said order and promise of the defendants, he the plaintiff has well and truly observed and performed all things in the said order on his part and behalf to be observed and performed. And the plaintiff avers, that he the plaintiff, confiding in the said promise of the defendants, afterwards, to wit on the day and year first aforesaid, in pursuance of the said order, did proceed in the erection of the said coffer-dams under his aforesaid proposals, and the said plan and specification of the said *Dyson*, and did, in pursuance and for the execution of the said order, expend by himself and his servants his work and labour, and did expend divers materials in and about the same; and he the plaintiff did then, in further pursuance and for the execution of the said order, provide divers large quantities of timber and materials and implements required for striking such dams as aforesaid, of great value, to wit, of the value of 5000*l.* And, although the said plaintiff has always been ready and willing to execute an assignment to the said corporation of the said timber, materials, and implements required

for striking such dams and temporary bridge as aforesaid, and to execute a written contract for the completion of the said works, and to accept from the defendants or the said corporation such contract according to the terms of the said order, whereof the defendants and the said corporation always, from the time of the making of the said promise, had notice: yet the defendants, or any of them, have not, nor has the said corporation, although often requested so to do, paid to the plaintiff the said sum of 3000*l.*, or any part thereof; but the said sum remains, and is due, and wholly unpaid to the plaintiff. First breach.

And for assigning a further breach of the said promise of the defendants, the plaintiff says, that although he has been ready and willing to observe and perform the said order and complete the said coffer-dams in manner therein mentioned, and was always ready and willing to execute such contract and assignment to the said corporation as in the said order is mentioned, when the same should be prepared by the registrar of the said corporation as aforesaid: yet, although often requested so to do, and although a reasonable time for that purpose has long elapsed, the defendants have not, nor have any or either of them, caused or procured such contract to be prepared by the said registrar, or executed by the said corporation, but as well the defendants as the said corporation have wholly neglected and refused to allow such contract to be prepared, or to execute the same. Second breach.

And for a further breach of the said promise of the defendants the plaintiff says, that although he the plaintiff has always been ready and willing to complete the said coffer-dams according to the tenor and effect, true intent and meaning of the said order, yet neither the defendants nor the said corporation did or would suffer or permit the plaintiff to erect the said coffer-dams according to the said order, or to cause the said order to be thereby executed; but the plaintiff afterwards, to wit Third breach.

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on the 2d of *March* 1835, was, by the defenda the said corporation, against the will of the discharged and prevented from erecting and con the said coffer-dams, whereby the plaintiff has been deprived of all the benefit and advantag by him would have been derived from the con of the erection of the said coffer-dams; and also he the plaintiff has lost divers large sums of amounting in the whole to a large sum of money 5200*l.*, in the sale of the said timber, materials, plements provided by him as aforesaid, and has a prevented from entering into other contracts w might and would have entered into, and the and advantages he might and would have derive from (*a*).

(*a*) Defendants' points. Objections to the first count of the declaration, — That there was no sufficient consideration alleged for the defendants' promise.

To the first breach, — That the plaintiff's readiness to execute the contract and assignment could not entitle the plaintiff to receive the 3000*l.*, or any part thereof; that the defendants never bound themselves that the 3000*l.* should be paid, but merely that the contract should be entered into: that the declaration, so far as the first breach is concerned, is insufficient for not stating that the contract had been prepared, or that a reasonable time had elapsed for preparing the contract and assignment; for not stating that the corporation had executed or were willing to execute the contract; for not stating that plaintiff had provided all the requisite materials, or that the said *Dy* prepared the plan an fication of the works a reasonable time had for his so doing.

To the second breach the first count is bad stating that the plain prepared or tendered a for execution, or any excuse for not doing the defendants did n themselves that the co be executed by the de or the corporation sh prepared by the registr the corporation, or b selves the defendants; was as much the dut plaintiff as it was of poration or of the de to cause the registrar pare the contract, if he to insist on the executi that the second breach for not alleging that th tiff had provided all th site materials, timber,

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Third plea, to the first breach of the promise in the first count of the declaration alleged, — that the plaintiff has not well and truly observed and performed all things in the said order contained on his part and behalf to be observed and performed, in manner and form as in the said first count alleged, but on the contrary thereof the defendants say, that the plaintiff hath not entered into or executed any such contract as in the said order mentioned, or assigned to the said corporation the timber, materials, and implements required for striking the said dams in the said order mentioned — concluding to the country.

To this plea there was a special demurrer, assigning for causes, — that inasmuch as the contract and assignment were to be prepared, not by the plaintiff but by the registrar of the corporation, the entering into such contract and executing such assignment were not conditions precedent to the payment of the 3000*l.*; that the plea states and relies on matter not alleged in the declaration, and ought to have concluded with a verification; that the plea is double, inasmuch as it not only denies that the plaintiff has not entered into or executed such contract as in the order mentioned, or assigned the said timber, materials, and other implements, but also that the plaintiff has not observed and performed all things in the order contained on his part and behalf to be observed and performed; that the observance and performance by the plaintiff of all things in the said order contained on his part and behalf to be

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plements for striking the dams, or given notice to the defendants of what they consisted, to enable them to prepare the necessary assignment thereof; and also, for not stating that a reasonable time had elapsed for preparing the assignment.

To the third breach, — That the defendants did not bind themselves that the corporation would perform or fulfil the contract mentioned in the order, but merely that they should enter into the contract.

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observed and performed, was not a condition precedent to the payment of the 3000*l.* (*a*).

Fourth plea, to the first and second breaches, — that the plaintiff did not, at the requests of the defendants, provide, nor was he possessed of, or entitled to, the timber, materials, and implements required for striking the said dams in the said order mentioned, at any time before the commencement of this suit. Verification.

Replication to the fourth plea, so far as it relates to the first breach, — that after the plaintiff had proceeded in the erection of the said coffer-dams, and expended his work and labour and materials, and after he had provided the quantities of timber, materials, and implements required for striking the said dams in manner as in the first count is alleged, and whilst the plaintiff was proceeding to provide the residue of the timber, materials, and implements required for striking the said dams, and also before a reasonable time for that purpose had elapsed, and before the plaintiff had made any default in the premises, to wit on the 1st *December* 1834, as well the defendants as the said corporation, refused to allow the said contract in the said order mentioned to be prepared, and to execute the same; and the defendants and the said corporation then, against the will and without the consent of the plaintiff, refused to allow, the said striking of the said coffer-dams to be further proceeded with, and discharged the plaintiff from providing any further timber, materials, and implements required for striking the said dams, than the quantities of timber, materials, and implements in the declaration mentioned to have been provided by the

(*a*) Plaintiff's points.—That as by the order, the contract and assignment were to be prepared by the registrar of the corporation, it was sufficient if the plaintiff was ready to execute the same, as alleged in the declaration, without actual execution thereof; and that the third plea is double and wrongly concluded, as set out in the special causes of demurrer.

plaintiff for striking the said dams, and wholly dispensed with any assignment of the timber, materials, and implements, or any part thereof, required for striking the said dams. Verification.

The defendants demurred specially to this replication, assigning for causes, — that the allegations contained therein are at variance with, and a departure in pleading from, the allegations in the declaration, so far as it relates to the first breach of promise in the first count alleged, inasmuch as that part of the declaration alleges that the plaintiff was always ready and willing to execute an assignment to the said corporation of the said timber, materials, and implements required for striking such dams and temporary bridge as therein mentioned, whereas the replication admits that the plaintiff did not provide, and that he was not possessed of, or entitled to, the timber, materials, and implements required for striking the said dams, and attempts to shew an excuse for his not providing, or being possessed of, or entitled to them, and states that the defendants discharged the plaintiff from providing any further timber, materials, and implements required for striking the said dams than the said quantities of timber, materials, and implements in the declaration mentioned to have been provided by the plaintiff for the said dams; and that it is not stated or alleged in or by the replication that the said charge and dispensation in that replication mentioned were in writing. Joinder in demurrer (*a*).

(*a*) Defendants' points. — In addition to the special causes of demurrer pointed out, — That notwithstanding the matters alleged in the replication to the fourth plea, so far as it relates to the first breach, the plaintiff was not entitled to receive the 3000*l.*, or any part thereof, before the execution of the assignment of the timber, materials, and implements required for striking the said dams; and that the dispensation for the corporation, alleged in the said replication to the fourth plea, is not stated or alleged to have been under the seal of the corporation.

Plaintiff's points. — That

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Fifth plea to the second breach, so far as it relates to the defendants' not having caused or procured such contract to be prepared by the registrar, and to the defendants and the corporation neglecting and refusing to allow such contract to be prepared, — that the defendants had not, nor had any or either of them, nor had the said corporation at any time before the commencement of this suit, any notice that the plaintiff was possessed of, or entitled to, all the timber, materials, and implements required for striking the said dams in the said order mentioned, and of what such timber, materials, and implements consisted, and of the quantity, quality, description, and value thereof; and that the plaintiff did not, at any time before the commencement of this suit, make out or deliver, or offer to deliver to the defendants, or either of them, or to the said corporation, any list or schedule containing an account of the quantity, quality, description, and value of the timber, materials, and implements which the plaintiff had provided, and which were required for striking such dams and temporary bridge in the said first count mentioned, so as to enable the said registrar of the said corporation to prepare a necessary, proper, and valid assignment thereof to be executed by the plaintiff. Verification.

Replication to the fifth plea, — that after the plaintiff had proceeded in the erection of the said coffer-dams, and expended his work, and labour, and materials, and after he had provided the quantities of timber, materials, and implements required for striking the said dams in manner as in the first count is alleged, and whilst he the plaintiff was proceeding to provide the residue of

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the replication is no departure; and that the plaintiff is entitled to the 3000*l.*, it appearing on the pleadings that the plaintiff has performed the contract on his part, except where such performance was dispensed with, which dispensation need not be in writing.

the timber, materials, and implements required for striking the said dams, and also before a reasonable time for that purpose had elapsed, and before the plaintiff had made any default in the premises, to wit on the said 1st of *December* 1834, as well the defendants as the said corporation refused to allow the said contract in the said order mentioned to be prepared, and to execute the same as in the said second breach of promise is mentioned, and the defendants and the said corporation then, against the will and without the consent of the plaintiff, refused to allow the said striking of the said coffer-dams to be further proceeded with, and discharged the plaintiff from providing any further timber, materials, and implements required for striking the said dams, than the quantities of timber, materials, and implements in the declaration mentioned to have been provided by the plaintiff for striking the said dams, and wholly dispensed with any assignment of the timber, materials, and implements, or any part thereof, required for striking the said dams. Verification.

The defendants demurred specially to this replication, assigning for causes, — that the allegations therein contained are at variance with, and a departure in pleading from, the allegations contained in the declaration, so far as it relates to the supposed causes of action in the introductory part of the fifth plea mentioned, inasmuch as the plaintiff has, in and by the said last-mentioned part of his declaration, stated and alleged that he was always ready and willing to execute such assignment to the said corporation as in the said order is mentioned, whereas, by the said replication to the said fifth plea, he confesses and admits that he was not always or at any time possessed of, or entitled to, the timber, materials, and implements required for striking the said dams; also for that it does not appear that the defendants, by writing, or that the corporation, by any writing or instrument

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under their seal, discharged the plaintiff from providing any further timber, materials, and implements required for striking the said dams than the quantities of timber, materials, and implements in the declaration mentioned to have been provided by the plaintiff for striking the said dams, or dispensed with any assignment of the timber, materials, and implements, or any part thereof, required for striking the said dams, whereas such discharge and dispensation, in the said replication to the said fifth plea mentioned, could not be binding at law unless in writing.

Joinder in demurrer (*a*).

Sixth plea, to the second breach of promise in the said first count alleged, so far as it relates to as well the defendants' as the said corporation's refusing to execute such contract as in the said order mentioned, and to the said defendants not causing or procuring such contract to be executed by the said corporation,—that the plaintiff did not prepare or tender to the said defendants any contract for the purpose of the defendants' causing the same to be executed by the said corporation. Verification.

General demurrer to this plea and joinder in demurrer (*b*).

Seventh plea to the third breach, — that the plaintiff was not ready to complete the said coffer-dams without first receiving from the defendants or the said corporation the sum of 3000*l.*, and wholly refused to proceed

(*a*) Plaintiff's points.—That the replication is not a departure; and that the plaintiff is entitled to recover on the second breach, it appearing on the pleadings that he has performed his part of the contract, except where such performance was dispensed with, which dispensation need not be in writing.

Defendants' points. — The special causes of demurrer assigned.

(*b*) Plaintiff's points.—That by the order, the contract was to be prepared by the registrar of the corporation, consequently the plaintiff was not bound to prepare or tender such contract.

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with the same until he had received the said sum of 3000*l.* Verification.

Special demurrer to this plea, assigning for causes, — that it was not the duty of the plaintiff to complete the said coffer-dams without first receiving the said sum of 3000*l.*, but it was sufficient if the plaintiff was ready to complete or completed the same after the payment by the said corporation of that sum; also, that the said plea amounts to an argumentative denial of the allegation in the declaration of the plaintiff's readiness to complete the coffer-dams; also, that the said plea is wrongly concluded with a verification; also, that it does not appear by the said plea but that the refusal of the plaintiff to proceed with the said coffer-dams was subsequent to the breach of promise in the first count thirdly as signed.

Joinder in demurrer. (*a*)

Ninth plea to the third breach, — that at the time when the plaintiff was discharged and prevented from erecting and completing the said coffer-dams, he, the plaintiff, had not executed or signed, or entered into such contract as in the said order mentioned, or executed such assignment as in the said order mentioned. Verification.

General demurrer to this plea, and joinder. (*b*)

Kelly (with whom was *Byles*), for the plaintiff. Three breaches are assigned in this declaration. It may be

(*a*) Plaintiff's points.—That by the contract the plaintiff was not bound to complete the coffer-dams without being paid the 3000*l.*; and that the seventh plea was argumentative, wrongly concluded, and uncertain, as in the demurrer specially assigned.

(*b*) Plaintiff's points.—That as the contract was partly performed by the plaintiff, and he was ready to complete the same, and as the contract and assignment were to be prepared by the registrar of the corporation, the non-execution of such contract and assignment afforded no answer to the discharge of the plaintiff from completing the order as complained of in the third breach.

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convenient, at the outset, to call the attention of the court to the second breach assigned, inasmuch as upon that breach the plaintiff is clearly entitled to judgment; and, if so, it will be a mere question of costs with respect to the other breaches.

The second breach is, that the defendants and the corporation refused to allow the contract to be prepared by the registrar of the corporation, or to execute the same.

The first objection raised to this breach is, that the defendants are not personally liable by reason of the default of the corporation to prepare and execute the contract. It is averred in the declaration, that the defendants made an order that a contract should be entered into with the plaintiff. By whom the contract was to be entered into, whether by the defendants or by the corporation, does not distinctly appear. Neither is it material; for even if the contract is to be entered into by the corporation, still there are here mutual promises between the plaintiff and the defendants, which form a good consideration for the express promise of the defendants, that all things contained in the order shall be performed. Undoubtedly it is stated that the defendants made the order on behalf of the corporation; but the promise they enter into is in their own individual capacities, and not as agents. Therefore the question that sometimes occurs, whether a party who represents himself as acting for another is personally liable, does not arise here. The law recognises many cases in which a person, on a good consideration, may promise for another; as, for example, a contract by an agent that his employer shall grant a lease on his return from abroad. [*Tindal* C. J. This is like the case of a covenant by an individual member of a company, that the company shall be liable for the contract that he makes.]

The second objection is, that in order to give the

plaintiff a right to sue the defendants, he should have prepared the contract and tendered it to the corporation for their execution. It is clear that the tender of the contract by the plaintiff is not a condition precedent to his title to recover; for the defendants, by their order, have relieved him from the necessity of tendering the contract, having undertaken that it should be prepared by the registrar of the corporation. If, therefore, the plaintiff had prepared it, the defendants would not have been bound to get it executed by the corporation, for all they undertook was, that the corporation should execute a contract prepared by their own officer.

The third objection is, that a reasonable time had not elapsed for the preparation of the contract, neither the defendants nor the corporation having had any notice that the plaintiff had provided the materials required for striking the dams. It is, however, alleged in the declaration, that a reasonable time for the preparation of the contract had elapsed, and that averment is not denied. With respect to the materials for striking the dams, the entering into the contract and providing those materials are distinct parts of the agreement. The two things to be done are entirely independent of each other; they are not even concurrent acts. The question with regard to the providing of the materials only becomes important when the plaintiff seeks to recover the 3000*l.* There is nothing in the agreement calling on him to provide materials till the contract is executed, and he has got the security of the corporation.

Peacock, contrà. First: — the defendants are not personally liable on the order set out in the declaration, for the order itself discloses that they were acting merely as agents for the corporation. The words used are, that they ordered on behalf of the corporation, and not that they, on behalf of the corporation, ordered. The

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distinction between the two forms of expression is recognised by Lord *Lyndhurst* in *Hall* v. *Ashurst* (*a*). Where a party gives an order as the agent of another, the law will not imply a promise by him to pay. But it is said that an express promise on the part of the defendants is alleged in the declaration. If that be so, a sufficient consideration for such promise must be shewn. [*Tindal* C. J. Is not the agreement by the plaintiff to perform the order a sufficient consideration for the promise of the defendants?] That might have been so, if the promises had been mutual; but the declaration alleges that, in consideration that the plaintiff "*had then promised*" the defendants to observe, &c., the defendants "*then promised*," &c. The word "had" shews that the plaintiffs' promise was then complete. It is clear that one promise cannot form a good consideration for another, unless both are made at the same time; and if one be complete before the other, both are *nuda pacta*.

In *Nicholls* v. *Raynbred* (*b*), "*Nicholls* brought an assumpsit against *Raynbred*, declaring that in consideration that *Nicholls* promised to deliver the defendant, to his own use, a cow, the defendant promised to deliver him 50*s*.: adjudged for the plaintiff, in both courts, that the plaintiff need not aver the delivery of the cow, because it is promise for promise. Note here the promises must be at one instant, for else they will both be *nuda pacta*." [*Tindal* C. J. Strictly speaking, the promises cannot be made at the same moment of time.] *Brown* v. *Crump* (*c*) is to the like effect. [*Erskine* J. There the tenancy was complete before the tenant made the promise.] It was decided in *Hopkins* v. *Logan* (*d*), that an executed consideration, whereon the law implies a promise to pay on request (as upon an account stated) will not support a promise to pay on a future day. It

(*a*) 3 *Tyrwh.* 420.; 1 *C. & M.* 714.

(*b*) *Hob.* 88.

(*c*) 6 *Taunt.* 300.; 1 *Marsh.* 567.

(*d*) 5 *Mees. & W.* 241.

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was there said by *Maule* B., "An executed consideration is no consideration for any other promise than that which the law would imply; if it were, there would be two existing promises on one consideration." So here, the consideration being executed, will support only such a promise as the law will imply, and there is no consideration for the express promise alleged.

The second question is, whether the defendants have bound themselves that the contract should be prepared by the corporation? It is submitted that the part of the order relating to the registrar, is a mere direction by the defendants, acting on behalf of the corporation, for him to prepare the contract. If the order in this particular is to be considered as binding on the defendants, they would have been equally liable if the registrar had refused to draw out such contract. In *Bacon's Abr.*, tit. *Conditions* (Q) 4., it is laid down, (*a*) "Regularly, if the condition be to be performed by a stranger, and he refuse, the obligation is forfeited; for the obligor hath taken upon him that the stranger shall do it." [*Tindal* C. J. You have not raised this point; you do not say that the registrar has refused, but you seek to throw the preparation of the contract upon the plaintiff.] Where two persons enter into an agreement, and one wishes to sue upon it, he must shew that he prepared and tendered it to the other party, unless the agreement expressly state that the latter is to prepare it. Here, there is only an order by the defendants that the registrar shall prepare the contract, and the promise alleged to be made by them is restricted to the acts of themselves and the corporation, and does not extend to those of the registrar. In *Jennings* v. *Major* (*b*), it was held that a tenant was

(*a*) Vol. i. 681., vouching 1 *Roll. Abr.* 452., which cites a case referred to by *Catesby* Serjt. in Sir *James Harington's Case*, *M.* 22 *E.* 4. fo. 25. pl. 6. fo. 26. *b.*

(*b*) 8 *C. & P.* 61.

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not bound, under an agreement by which it was stipulated that the landlord should, at his request and costs, grant him a lease of certain premises, to pay for a counterpart of the lease. [*Bosanquet* J. How does that case apply to the present? Here, if the plaintiff wanted a duplicate of the contract, he must have got it prepared and executed at his own expense. *Tindal* C. J. In this case the contract is to be prepared by the registrar — that is the substratum of the agreement between the parties.]

Thirdly, the corporation were not bound to prepare and sign the contract until the plaintiff had provided the materials for striking the coffer-dams. [*Tindal* C. J. It could never be intended that it should be a condition precedent for the plaintiff to provide the materials before the contract was signed.]

With respect to the first and third breaches, there can be no doubt they are insufficient. The question on the first breach is, whether the defendants or the corporation were liable to pay the plaintiffs the 3000*l.* before the contract and the assignment of the materials were executed. It is clear that they were not so liable, and the utmost that the plaintiff can claim to recover, is damages for the refusal of the corporation to prepare the contract. The declaration alleges that the plaintiff had provided materials required for striking the dams. The fourth plea denies that the plaintiff had provided the materials required for striking the dams mentioned in the order, whereupon the plaintiff replies that he had provided a part of the materials, and was about to provide the residue, when the corporation refused to allow him to proceed with the work. If the plaintiff intended by the allegation in the declaration to say he had provided the whole of the materials, the replication is clearly a departure; if he meant that he had provided only a part, then the allegation is insufficient.

The third breach is of the same nature as the first. It is alleged in that breach that neither the defendants

nor the corporation would suffer the plaintiff to erect the coffer-dams according to the order. The seventh plea states that the plaintiff refused to proceed with the dams until he had received the 3000*l.* Independently, however, of that plea, all that the defendants bound themselves to was, that the corporation should enter into the contract; they did not undertake that the corporation should perform it.

Kelly, in reply. It has been argued that the consideration for the defendants' promise is alleged as a past consideration, and consequently is incapable of supporting the promise. At the most, however, it is a consideration defectively stated, and not a defective consideration; and, if so, as the objection is taken on general, and not on special demurrer, it cannot prevail. If there be an error, it is merely an error in grammar. Throughout the declaration only one time is mentioned. It states that the defendants, on the 12th of *November* 1836, made an order, which is set out; and it goes on to aver, that *thereupon*, the said order being so made, in consideration of the premises, and also in consideration that the plaintiff had then promised the defendants to observe, &c., the defendants then promised the plaintiff, &c. There is but one transaction and one occasion spoken of throughout. The word "then" applies both to the promise of the plaintiff and to that of the defendants. The plaintiff's promise could not be given before the order of the defendants was made. The promises and the order must have taken place at the same time, for the word "thereupon" is the strongest that can be used to indicate the immediate succession of time. The court will not incline to give to the words used a meaning fatal to the declaration. The reasonable intendment is, that forthwith after the order the plaintiff made his promise, and forthwith the defendants made theirs. The rule of

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law undoubtedly is, that a past consideration will not support a subsequent promise without a request, either express or implied; but on referring to the cases on the subject it will be found that the language used in them shewed more distinctly that the consideration was a past consideration than the words employed here. In *Hayes* v. *Warren* (*a*), where the judgment was arrested on this ground, the declaration was for work and labour done by the plaintiff for the defendant, in consideration whereof he afterwards promised to pay; and the court held that, as it did not appear the work and labour was for the benefit of the defendant, they must take it to be a past consideration, being laid that *postea* he promised to pay. That case is distinguishable from the present, for there it was alleged that the services were performed, and that the defendant afterwards promised. In averring a past consideration, the words "before that time" are generally employed; but here the only expression to separate the time is "then." [*Bosanquet* J. You say "then" means "at that time," or "at the same time or occasion." You must go that length.] The court can only give a different meaning to the term by interposing the word "before." [*Bosanquet* J. The other side must contend it means that the defendants had "at that time before" promised.] The court may give a reasonable construction to the declaration by reading the word "then" as descriptive of one and the same interval of time.

As regards the second breach, it is said that the registrar might have refused to prepare the contract. If he did refuse, it should have been so pleaded. As already observed, the stipulation for entering into the contract, and that for providing the materials, are quite distinct; and the other side have failed in shewing that the exe-

(*a*) 2 *Strange*, 933.

cuting of the contract depended upon the assignment of the materials.

With respect to the first breach, it is well assigned, and the plea to it, alleging that the plaintiff had not executed the contract or assigned the materials, affords no sufficient answer; for, as it was owing to the default of the corporation that the contract was not prepared, the plaintiff, as soon as he was ready and willing to perform his part of the agreement, became entitled to the 3000*l.* It would have been otherwise if the plaintiff had claimed the whole 5000*l.*, for then it might have been said that he had no right to demand that sum until the work was done.

The pleas to the third breach only answer a part of that breach. It is consistent with all that is stated in the seventh plea, that the plaintiff proceeded with the work until he was prevented by the corporation, and that he was then willing to go on upon receiving the 3000*l.* If that plea was intended to traverse the readiness of the plaintiff to perform the work, it should have concluded to the country. The ninth plea is in reality a demurrer, in the form of a plea, to the third breach.

TINDAL C. J. This is an action brought against the defendants, who appear on the face of the declaration to be in some way connected with a corporation called "The Governors, Bailiffs, and Commonalty of the Company of Conservators of the *Great Level* of the Fens." What their exact position is does not appear—they may either be individual members of that body, or a committee acting on its behalf. The declaration states that these three persons, after mature consideration, considering it absolutely necessary for the security of the country that coffer-dams should be forthwith struck round the three old eyes of *Denver Sluice*, for

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the purpose of examining their actual state, ordered, on behalf of the corporation, that a contract should be entered into with the plaintiff for the erection of such coffer-dams under the plaintiff's own proposals, and the plan and specification of one *Dyson*, at the sum of 5000*l.*; and that the sum of 3000*l.*, part thereof, should be paid to the plaintiff upon the execution of the said contract, and upon an assignment of the timber, materials, and implements required for striking such dams to the corporation, as a security for the sum so advanced. The declaration then sets out the other particulars of the proposed contract, as contained in the order, the concluding provision being, that the registrar of the corporation should prepare the necessary contract and assignment to be executed by the plaintiff. The declaration then alleges, that thereupon, the said order being so made, in consideration of the premises, and also in consideration that the plaintiff *had then promised* the defendants to observe and perform all things in the said order contained on his part and behalf to be observed and performed, the defendants *then promised* the plaintiff that all things should be observed and performed which in the said order were contained *on the part and behalf of the said corporation* and of them the defendants to be observed and performed.

Now, it appears, as well on the declaration as from the rest of the pleadings, that the contract was never entered into at all, so that the action, in point of fact, is for not entering into the contract.

Three breaches are alleged in the declaration. The first is, that although the plaintiff had always been ready to execute an assignment of the materials required for striking the dams, and to execute the contract, yet neither the defendants nor the corporation had paid him the 3000*l.*; making the breach of this part of the agreement to consist of the non-payment of that sum. The

second breach is, that although a reasonable time had elapsed, the defendants had not caused or procured the contract to be prepared by the registrar, or executed by the corporation. The third breach is, that although the plaintiff was ready and willing to complete the coffer-dams, neither the defendants nor the corporation would permit him to erect the dams, but discharged and prevented him from erecting and completing them; whereby he incurred certain specified damage.

One class of objections taken on the part of the defendants is, that these breaches are not properly assigned. If that be so, it will be unnecessary to go further; and I will, therefore, first consider whether the breaches can be sustained.

With respect to the first, it does not appear to me to be a sufficient breach of the agreement by the defendants that a contract should be entered into with the plaintiff, under which, when he had executed it, and had assigned the materials required for striking the dams, he was to receive 3000*l.* It seems to me, that the breach, being a simple denial of the payment of the 3000*l.*, unaccompanied by any averment that the corporation had entered into the contract, cannot be supported. The third breach is also insufficient, for the defendants do not undertake, by the order, that the coffer-dams shall be erected, but merely that a contract shall be entered into with the plaintiff for their erection.

We now come to the second breach, the gravamen of which is, that no contract has been entered into by the corporation. If, by the terms of the order, the defendants have rendered themselves personally liable, the refusal by the corporation to execute the contract will form a good ground of action. That seems to be in effect alleged in the present breach; the first part of the breach is, that the defendants had not caused or procured such contract to be prepared by the registrar, or executed

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by the corporation. If the breach had stopped there, an objection that has been urged might have prevailed; but it goes on to state that as well the defendants as the corporation had wholly neglected and refused to allow such contract to be prepared, or to execute the same. That is a distinct and substantive breach of the agreement of the defendants contained in the order, by which they undertook that the corporation should enter into the contract.

The other objections urged on the part of the defendants are, first, that the defendants are not personally liable. I agree that, if the action had been brought on the order alone, they could only be considered as the agents of the corporation, and not as personally liable. But when we find in the declaration an allegation that, after the order was made, the defendants expressly promised the plaintiff that all things contained in the order should be performed, if there be a sufficient consideration for such subsequent promise, it will, being engrafted upon the order, constitute a personal liability on the part of the defendants.

We arrive now at the main question which has been raised upon the case, namely, whether the declaration contains a sufficient allegation of a good consideration for the defendant's promise. It is conceded that a bygone consideration, unless supported by a request will not sustain a subsequent promise. One of the oldest authorities on this subject is *Hunt* v. *Bate* (*a*), where it was held that an *assumpsit* will not lie on a consideration that is executed. So again in 1 *Rolle's Abr.* 11. (*b*), it is said that a consideration wholly executed (*c*) is not good; thus, if a man disburse money about the affairs of another without request, and then the latter promise that, in consideration of the former having laid out the money for

(*a*) *Dyer*, 272.
(*b*) *West* v. *West*, *P.* 11 *Jac.* 1.
(*c*) *Tout outrement passe.*

him, he will pay him 20*l*., that is not a good consideration, being completely executed. But the language of this declaration is quite compatible with the supposition that the parties being together, the promises were then concurrently and mutually made. I think that the fair and reasonable construction of this allegation is, that the word "then" relates to the same period of time in the case of both promises; and that we are not bound to refer the one promise to a period antecedent to the other, although the plaintiff's promise may possibly have preceded the defendants', but that we may take them to have been simultaneously made.

Another objection to the second breach is, that there ought to have been a tender of the contract by the plaintiff, such tender forming a condition precedent to his right to sue. The order, however, provides that the contract shall be prepared by the registrar of the corporation, and it seems to me that the terms of the order exclude the contract from being drawn up by any one else. There was therefore no necessity for the plaintiff to tender any contract.

Another objection is, that the plaintiff should have executed an assignment of the materials required for striking the dams. This objection is open to the same course of observation as the preceding. The assignment of the materials was to be subsequent to the execution of the contract; it was never intended that the plaintiff should assign them over before the corporation had entered into the contract.

I am consequently of opinion that upon the second breach the judgment must be entered for the plaintiff; upon the first and third breaches the defendants are entitled to judgment.

BOSANQUET J. The declaration, after setting out an order made by the defendants, alleges that they pro-

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mised the plaintiff that all things contained in the order on the part of the corporation therein mentioned should be performed; and it then proceeds to assign three breaches of such promise. It is said that there is no sufficient consideration for the promise, and that it is not personally binding on the defendants. With respect to the consideration, it is clear, on the authorities referred to by the Chief Justice, that a consideration executed is not a sufficient consideration for a subsequent promise. No case, however, has been cited precisely similar to the present. It is said that the plaintiff's promise, which is the consideration for that of the defendants, appears on the record to have been made antecedently to the promise of the latter. It may be admitted that, according to the language of the declaration, the plaintiff's promise did precede thatof the defendants. I doubt much, however, whether it can be considered as a consideration completely spent, being a promise made in respect of the same order, and relating to the same matters as the promise of the defendants. In the authorities cited the consideration was altogether executed; and no case has been referred to in which the language is the same as that used here. The question is, what is the fair and reasonable construction to be put on the word "then." It is the expression "had" which alone gives rise to any doubt. That word certainly imports that the promise of the plaintiff preceded the defendants; but if "then" is construed to mean, as I think it ought, "at that time," the allegation is, that, on the same occasion, the parties promised in the order set forth in the declaration. I therefore concur with the Chief Justice in thinking that there is a sufficient consideration for the defendants' promise.

It is next said that the promise is not personally binding on the defendants. It, however, sufficiently appears on the declaration that their promise is not a promise

merely resulting from the premises, but, an express promise actually made by them; for there is a distinct allegation stating that as a matter of fact; consequently the promise is personally binding upon them, there being a sufficient consideration alleged for such promise.

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Three breaches are assigned in the declaration. With respect to the first and the third, the plaintiff is not entitled to recover for the reasons given by the Chief Justice. Those breaches are founded on the assumption that the contract was entered into, and are for the non-performance of matters which were to be contained in such contract; but, in point of fact, no contract was ever executed.

But with respect to the second breach, it is expressly framed on the neglect and refusal to prepare and enter into the contract. It is said that the defendants have not refused to allow the contract to be prepared, inasmuch as it was to be prepared by the registrar of the corporation, for whose acts they are not responsible. But the registrar is the servant and officer of the corporation, and the latter, by not causing it to be prepared by him, are guilty of a breach of the agreement, which the defendants undertook for them. It is then said that the plaintiff should have tendered a contract to the corporation for their execution; but it was not incumbent on him to do so, the order containing an express stipulation that the contract should be prepared by the registrar.

COLTMAN J. I am of the same opinion. It appears to me that, without straining the sense of the language used in this declaration, we may understand that the same interval of time is intended throughout, and that the promises of the plaintiff and of the defendants may be taken to have been simultaneously made. If

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that be so, there is a sufficient consideration for the promise of the defendants on which the present action is brought.

I also think that the defendants are personally liable upon their promise. A party may bind himself, on a sufficient consideration, that another shall perform a certain act. Here the defendants promise that all things contained in the order, on the part of the corporation, shall be performed. What is it, then, that the defendants undertake to do? On referring to the order, it is that the corporation shall enter into a contract with the plaintiff, which is to be prepared by the registrar of the corporation. If that be the promise of the defendants, it is clear that the first and third breaches, which are formed on the supposition that the contract has been actually entered into, cannot be sustained.

But with respect to the second breach, the same objection does not apply, for it seems to me to amount to a substantial breach of the defendants' agreement. Is there then any sufficient answer to that breach? The fourth plea alleges that the plaintiff did not provide the materials required for striking the coffer-dams. It was not, however, incumbent on him to do so until the contract was executed, and the corporation had bound themselves to pay him for his work. The fifth plea states that neither the defendants nor the corporation had notice that the plaintiff was possessed of the materials before mentioned, so as to enable the registrar of the corporation to prepare an assignment thereof. But if it was not necessary that the plaintiff should provide the materials, it clearly was not necessary for him to give any such notice. The sixth plea alleges that the plaintiff did not prepare or tender to the defendants or to the corporation any contract for the execution of the latter. But, it being stipulated by the order that the contract

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should be prepared by the registrar, it was not requisite that the plaintiff should prepare a contract which the corporation would not have been bound to execute.(a) I therefore think that no sufficient answer has been given to the second breach, and that, as regards it, the plaintiff is entitled to judgment.

ERSKINE J. I concur with the rest of the court, except upon one point. With regard to the first and third breaches I agree that the defendants are entitled to judgment. The first breach is sufficiently answered by the third plea. The third breach is bad upon the face of it; for the defendants did not, by the order, stipulate that the plaintiff should perform the work, but only that a contract for it should be entered into with him by the corporation.

As regards the second breach, I should have concurred with the Chief Justice and my two learned brothers, if it had not been for the point raised with respect to the consideration alleged in the declaration for the defendants' promise. The pleas to that breach have been sufficiently answered; but, inasmuch as the defendants have demurred to the replications to those pleas, they may take advantage of any defect upon the declaration that would be open to them on general demurrer. The declaration, after setting out the order, proceeds to state the defendants' promise as follows: [Here the learned judge referred to the allegation.] Now it is material to observe that the order itself does not purport to be

(a) As to the necessity of tendering a conveyance, see *P.* 11 *H.* 7, fo. 21, pl. 7.; *Mills* v. *Wood*, *Cro. El.* 718.; *Phillips* v. *Fielding*, 2 *H. Bla.* 123.; *Pincke* v. *Curteis*, 4 *Bro. C. C.* 332.; *Baxter* v. *Lewis*, *Forrest*, 61.; *Goodisson* v. *Nunn*, 4 *T. R.* 761.; *Glasebrook* v. *Woodrow*, 8 *T. R.* 366.; *Heard* v. *Wadham*, 1 *East*, 627.; *Standley* v. *Hemmington*, 6 *Taunt.* 561. 2 *Marsh.* 276.; *Mattock* v. *Kinglake*, 10 *Ad. & El.* 50., 2 *Perr. & Dav.* 343.; 4 *Vin. Abr.* 129, 130, 137, 138, 139, 258, 266, 270.

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made by the defendants on their own account, but on behalf of the corporation. Therefore, as no promise can arise upon the order by inference of law, the only liability that the defendants can incur, is in respect of the express promise subsequently alleged.

A promise being expressly stated on the face of the declaration, the question is, whether there is a sufficient consideration for such promise. The consideration alleged is the promise made by the plaintiff — "in consideration that the plaintiff *had then* promised." Granting that the word "then" may mean that the promises of the plaintiff and the defendants were made on the same occasion; that does not appear to me to be sufficient, unless it is shewn that the promises were also mutually made. It would have been enough to aver that the defendants' promise was made at the plaintiff's request; but ther is no such allegation. It is said that it is sufficient if the promises are made at one and the same time. But the objection appears to me to be this — the defendants not being personally liable upon the order, to render them so liable, it should have been shewn that the plaintiff's promise was made, either in expectation and in consideration of the promise of the defendants, or at their request; neither of which is alleged in this declaration.

But for the opinion that has been expressed by the rest of the court, I should have thought the declaration insufficient upon this point, and I cannot acquiesce in the judgment they have pronounced.

Judgment for the plaintiff upon the second breach, and for the defendants upon the first and third breaches.

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May 1.

COVENANT. The declaration stated that on 20th *December* 1836, by indenture between the defendant and the plaintiffs, — profert — the defendant demised unto the plaintiffs, their executors, administrators, and assigns, a certain brewery and brewing-business, then, or then recently, occupied and carried on by the defendant, in *Spring Street, Sheffield*, and known by the name of *Gray's XX. Brewery*, together with the brewer's house, &c., and appurtenances thereto belonging, or used, or occupied therewith; and also the exclusive, *or such other*, privilege as the defendant then enjoyed, of supplying ale, beer, porter, and other malt liquors, to certain public houses, then the property of the defendant, or under his control, that is to say, the *Punch Bowl*, &c., all in the town of *Sheffield*, and all ways, &c., and appurtenances whatsoever to the said brewery and hereditaments, exclusively belonging; *habendum*, from the 28th *August* then last past, for the term of ten years, if the defendant should so long live: And the defendant, for himself, his heirs, &c. did thereby covenant with the plaintiffs, their executors, &c., that they, the plaintiffs,

Covenant upon an indenture, whereby the defendant demised to the plaintiffs for ten years a brewery at *S.*, "and also the exclusive or such other privilege as the defendant then enjoyed of supplying ale," &c. to certain public houses "then the property of the defendant, or then under his control, that is to say, the *Punch Bowl*," &c. The declaration averred that at the time of making the indenture the defendant was the landlord and owner of the *Punch Bowl*, and in the occupation thereof, and that afterwards he demised it to one *G.*, who covenanted with the defendant to purchase all the ale, &c. consumed on the premises from the plaintiffs. Breach that *G.*, during his tenancy of the *P. B.*, did not purchase all the ale, &c. from the plaintiffs, but purchased it from the defendant and others: Held, that this breach was not well assigned, and also that the declaration should have shewn *what* privilege the defendant possessed.

Semble, that no covenant with respect to such a privilege can be implied from the word "demise."

A covenant by the lessor of a brewery, that he will not "during the continuance of the demise, carry on the business of a brewer or merchant, or agent for the sale of ale, &c. in *S.* or elsewhere, or in any other manner howsoever, be concerned in the said business," is void, as being a general restraint of trade.

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paying the yearly rent of 500*l.*, and performing, fulfilling, and keeping the covenants, conditions, and agreements therein contained on their parts to be fulfilled, performed, and kept, should peaceably have, hold, &c. *the premises thereinbefore demised*, without any let, suit, trouble, or interruption by or from the defendant, his heirs, &c., or any other person or persons lawfully claiming by, from, under, or in trust for, him, them, or any of them, or by or through, or by reason or means of his or their neglect, default, means, privity, or procurement; and that the defendant would not, at any time or times during the continuance of that demise, either by himself, or for, by, or with any other person or persons, or for the use or benefit or advantage of any other person or persons whatsoever, exercise or carry on the trade or business of a brewer, or merchant, or agent for the sale, of ale, beer, or porter in *Sheffield* or elsewhere, or in any manner howsoever be concerned in the said trade or business, but would, so far as the same should not interfere with his private business and avocations, when requested thereunto, instruct and give all and every the information and advice in his power to the plaintiffs respecting the management and carrying on of the brewery, and of the business connected therewith, to the intent that the plaintiffs might derive the full and whole benefit and advantage thereof, and that the plaintiffs should have and enjoy the exclusive, or such other privilege as the defendant, at the time of the making of the said indenture, enjoyed, of supplying ale, &c. to the public houses then the property of the defendant, or then under his control, that is to say, the public houses above-mentioned. And the plaintiffs did thereby jointly and severally covenant with the defendant, that they, during the continuance of the demise, if the interest and estate of the defendant in the several public houses as above mentioned should last so long, would

supply the same, and every of them, with good and marketable ale, &c. and further, that the plaintiffs, some or one of them, would, on the order of the defendant, at all times during the continuance of the demise, serve and provide, or cause to be served and provided, the defendant, and all and every the tenant and tenants who should inhabit, keep, and occupy the said public house, known by the sign of the *Punch Bowl*, with all such good and marketable ale, &c. of every sort and kind whatsoever, which the defendant or such tenants as aforesaid respectively should or might use, consume, expend, or dispose of, in, upon, or from, the said public house, called the *Punch Bowl*, or any part thereof, at certain prices, that is to say, &c. The declaration then alleged that the defendant, at the time of the making of the indenture, was the landlord and owner of the said public house, called the *Punch Bowl*, and was also in the actual possession and occupation and tenancy thereof; and that on the 23d *August* 1837, by indenture, he demised the same public house for ten years to one *Golland*, who covenanted with the defendant that he would, during the whole of the said term, purchase all the ale, &c., sold or consumed on the said premises, from the plaintiffs, as, and in such manner, as the defendant was then under covenant to do.

First breach — that *Golland* did not nor would, during such his tenancy of the said public house, called the *Punch Bowl*, purchase all, or any of, the ale, &c. sold or consumed on the premises called the *Punch Bowl*, of or from the plaintiffs, nor was he, during the time aforesaid, supplied by the plaintiffs with ale, &c., but on the contrary thereof the said *Golland* purchased divers, to wit 500 barrels of ale, &c., of and from the defendant, and of and from divers other persons, to the plaintiffs unknown, and the same was then sold by and consumed on the premises of *Golland*, to wit, the said *Punch Bowl*.

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Second breach — that the defendant, afterwards and during the continuance of the term, to wit, on the said 20th *December* 1836, and from thence until the commencement of this suit, exercised and carried on the trade and business of a brewer, merchant, and agent for the sale, of ale, &c. in *Sheffield* aforesaid and elsewhere, by and for himself, and with and for divers other persons to the plaintiffs unknown, and during that time sold and disposed of divers, to wit, 500 barrels of ale, &c. not purchased of the plaintiffs, *or brewed by them*, to divers persons to the plaintiffs unknown.

Third breach — that the defendant, during all the time aforesaid, had also solicited and obtained divers orders for the purchase and sale of divers large quantities of ale, &c. not purchased of the plaintiffs, nor brewed by them, from divers persons to the plaintiffs unknown, and which orders had been supplied, and divers large quantities of ale, &c. thereunder delivered and sold, and had also, during all that time, as the agent of one *John Youle*, solicited and obtained orders for the supply of beer, ale, and porter by the said *J. Y.* to divers persons. And so, &c.

The defendant, after oyer of the indenture of the 20th *December* 1836, traversed the second breach.

As to the residue of the breaches, the defendant demurred specially, assigning the following several causes of demurrer.

As to the first breach, wherein it is alleged that the said *Golland*, during the time aforesaid, purchased divers, to wit, 500 barrels of ale, &c., of and from the defendant, and of and from divers other persons to the plaintiffs unknown, and the same was then sold by and consumed on the premises of *Golland*, to wit, the *Punch Bowl*, — that it is not averred that *Golland* was under any liability, at the time of the making of the indenture, or afterwards, to purchase ale, &c. of the plaintiffs, or that

the defendant had or enjoyed any exclusive, or other, privilege of supplying the *Punch Bowl*, at the time at which the indenture was made, or that any such interest passed to the plaintiffs, nor have the plaintiffs sufficiently, or at all, averred any liability of the defendant to be answerable for the neglect or refusal of *Golland* to purchase ale, &c. of the plaintiffs, nor have they alleged any covenant to that effect, or whereby the defendant should be bound for the acts of *Golland*, or that the plaintiffs had requested the defendant to put in force the covenant between the defendant and *Golland* for the benefit of the plaintiffs, or that the defendant had refused to do so, or that he had any notice that *Golland* had neglected or refused to purchase his ale, &c. of the plaintiffs, nor, distinctly or positively, that he covenanted so to do:—also that the names of the persons from whom *Golland* purchased the said ale, &c. sold by, and consumed on the premises of, *Golland*, and the quantities sold by the other persons and the defendant respectively, are not separately stated: — also that this breach is larger than the covenant; and that if it was meant to charge the defendant with a breach of the covenant that the defendant would not exercise or carry on the trade and business of a brewer, merchant, or agent for the sale, of ale, &c. in *Sheffield* or elsewhere, as set out in the declaration, the plaintiffs ought to have averred, that the defendant had sold the ale, &c. to *Golland*, in the exercise, or carrying on, of the trade or business of a brewer, &c., or agent for the sale, of ale, &c.

And as to the third breach, — which alleges that the defendant, during all the time aforesaid, hath also solicited and obtained divers orders for the purchase and sale of divers large quantities of ale, &c. not purchased of the plaintiffs or brewed by them, from divers persons to the plaintiffs unknown, and which orders have been supplied, and divers large quantities of ale, &c. there-

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under delivered and sold, and hath also, during all that time, as the agent of *J. Y.*, solicited and obtained orders for the supply of ale, &c. by *J. Y.*, to divers persons,— that the plaintiffs ought to have averred that he did so in exercising and carrying on the trade or business of a brewer, &c. by or for himself, or with or for other persons; and that the breach was more extensive than, and unwarranted by, any covenant in the indenture; and that the quantities of ale, &c. and names of the persons from whom the orders were solicited and obtained, ought to have been stated. Joinder in demurrer.

Whitehurst was heard in support of the demurrer, in last *Hilary* term.

Hoggins, contrà. The breaches in the declaration are well assigned. With respect to the third breach, the covenant on which it is founded, is said to be void, being in restraint of trade; and *Ward* v. *Byrne* (*a*) is relied on by the other side. There a bond given by the defendant on entering into the service of the plaintiff, who was a coal merchant in *London*, conditioned that the defendant should not, within two years after leaving the plaintiff's service, solicit, or sell to, any customers of the plaintiff, that he should not follow, or be employed in, the business of a coal merchant for nine months after leaving the plaintiff's employment, and that he should not leave such employment without giving a month's notice, was held to be void as being a restraint of trade, unlimited in point of space. That case, however, is distinguishable from the present; for there the judgment of the Court was put on the ground, that the restriction was larger than was required for the protection of the party taking it. Here the co-

(*a*) 5 *M.* & *W.* 548.

venant is not more extensive than is requisite to protect the plaintiffs; for as the defendant undertakes to instruct and advise them in the management and carrying on of the brewery, it is necessary that he should be present, and that he should not carry on business for himself elsewhere.

A soliciting of orders is not a trading; consequently, a covenant, not to act as an agent, is not in restraint of trade. If, therefore, the last breach be maintainable, the plaintiffs are entitled to judgment, the demurrer, which extends to the two breaches, being too large. *Spyer* v. *Thelwell.* (*a*) [*Erskine* J. Then on what covenant do you

(*a*) *Tyrwh. & G.* 191; 2 *Cr. M. & R.* 692.; *S. P. Price* v. *Williams*, *T. & G.* 197.; 1 *M. & W.* 6. At common law, after declaration, the defendant might call upon the court to pronounce judgment in his favour, upon the plaintiff's own shewing. He thus rested [demurra] upon the pleadings as they stood. See *Cowell*, verbo *Demurrer*. If the declaration contained several counts, or assigned several breaches, the defendant might either demur separately to each, or, adopting a more compendious form, he might file an entire demurrer to the whole declaration. In either case the defendant was considered as demurring as in three separate actions; *Bressey* v. *Humphreys*, *Cro. Jac.* 557; *S. C.* not *S. P.* 2 *Roll. Rep.* 144; *Andrews* v. *Delahay*, *Hob.* 178, and if one count only were good, or if one breach only were well assigned, the court, in pronouncing judgment on the demurrer, awarded that the plaintiff should recover upon such count or breach, and should be barred for the residue; *Richard Godfrey's Case*, 11 *Co. Rep.* 45 *a*; *Battey* v. *Trevillion*, Sir *F. Moore*, 281; *Woody* v. ——, *Cro. Jac.* 104; *Duppa* v. *Mayo*, 1 *Saund.* 286; *Pinkney* v. *Inhabitants de Rotel*, 2 *Saund.* 379; *Benbridge* v. *Day*, 1 *Salk.* 218; *Amory* v. *Brodrick*, 5 *B. & Ald.* 712. 716., 1 *Dowl. & R.* 361. Upon a demurrer to a bad and a good count, the question sometimes was, whether the former did not draw with it the latter, so as to entitle the *defendant* to judgment upon the whole record; but it was held, that the court was bound to give judgment in favour of the plaintiff, for that which was good, and against him, for that which was bad, *Pasch.* 9 *H.* 6, fo. 10, pl. 29. It was at one time considered to be indispensable, that an express opinion should be pronounced as to the sufficiency or insufficiency of the pleadings objected to; *Attwood* v. *Burr*, 1 *Salk.* 402, 2 *Lord Raym.* 821; but it has since been held, that judgment for the plaintiff, by an *Ideo con-*

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say the third breach is grounded? Two covenants only are set out in the declaration. If the second covenant be void, can the third breach be supported? *Tindal*

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sideratum est, without prefacing it, with *Et quia videtur curiæ quod placitum prædictum præfati defendentis minus sufficiens in lege*, &c. is good, *Bellew* v. *Scott*, 1 *Stra.* 440.

Latterly, however, a new practice has been introduced, (the principle and the very language of which may, without difficulty, be traced to the proceedings in courts of equity,) and of late years the courts of law, particularly the Court of Exchequer (which possesses an equitable, as well as a legal, jurisdiction), have spoken of *overruling* a demurrer as being *too large;* instead therefore of the question being, as formerly, whether, if the defendant demur to a good and a bad count, the court may give judgment distributivè, or is bound to give judgment, generally, for the *defendant*, it has been held that, under such circumstances, the *plaintiff* is entitled to receive *from the court* a general judgment upon the whole record, or upon so much as the demurrer extends to; *Ferguson* v. *Mitchell*, *Tyrwh. & Granger*, 179, 2 *Crompt. M. & R.* 687; *Spyer* v. *Thelwell*, *ubi suprà;* although, if the plaintiff suffer the officer of the court to record the general judgment which has been actually pronounced by the court, without intercepting such final entry, and, by some act of his own, renouncing the proffered boon, he does it *sub periculo incumbente*. *Wainwright* v. *Johnson*, 5 *Dowl. Pra. Ca.* 317. The first trace of this doctrine in a court of common law, which has been discovered, is to be found in the *Duke of Bedford* v. *Alcock*, 1 *Wils.* 248, where one of the points raised was, whether a count on a *mutuatus* could be joined with a count on an amercement. *Lee* C. J., in giving judgment, says, "As the *mutuatus* in this case is a good count, and may be joined, we must give judgment for the plaintiff; for *non constat*, but that, upon a trial, the plaintiff might be able to prove that count, and might take a verdict upon the same, though the other counts should be bad, *and therefore we have no occasion to give any opinion as to the other two counts.*" In other words, because it is needless for the court to sever, where the severance may be made at *nisi prius*, it is needless to sever where the judgment is to be pronounced by the court. The next case goes further; in the *Mayor of Exeter* v. *Trimlet*, 2 *Wils.* 95, in giving judgment upon a demurrer to a declaration, containing two counts, *Willes* C. J. (who even when a serjeant had chiefly practised in the Court of Chancery) not only declines giving a positive opinion as to the second count, impliedly assuming that the badness of the first count rendered the expression of an opinion as to the sufficiency of the second count unnecessary, but

C. J. Is not a soliciting of orders a part of the business? The two latter breaches are founded on a covenant, which, according to the judgment of the Court of Ex-

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also speaks of *overruling* the demurrer. In *Judin* v. *Samuel*, 1 *N. R.* 43, Sir *James Mansfield* C. J., who had just quitted the Court of Chancery, says, "Perhaps the defendant might have demurred to the two last counts, and upon that demurrer have obtained judgment; *but the course which the defendant has pursued calls upon the court to give judgment for or against the plaintiff, upon the whole declaration.*" The plaintiff, acting upon this decision, signed interlocutory judgment for himself on the whole declaration, but in executing his writ of inquiries, he took the precaution of assessing damages upon each count severally, and upon error brought, he entered a *remittitur damna* as to the insufficient counts, 6 *East*, 333. This was followed by *Powdick* v. *Lyon*, 11 *East*, 565, where the declaration, in *scire facias*, demanding execution for two sums, as to one of which the averment of *prout patet per recordum* was omitted, the defendant demurred to the whole declaration, assigning for cause of such demurrer the want of the *prout patet per recordum*. The objection being cured by 4 *Ann. c.* 16, unless specially assigned, and the assignment of cause being incorrect, in stating this as matter of objection to the *whole* declaration, the plaintiff was entitled to judgment for both sums. But Lord *Ellenborough* is represented as saying, "Then the demurrer being *too large*, and therefore bad, we must give judgment for the plaintiff generally; for we cannot give a judgment *that the demurrer is good in part.*" Now the form of a judgment on demurrer is, not that *the demurrer* is good or bad, either in the whole or in part, but that *the pleading demurred to* is good or bad, in the whole or in part; and there appears to be no greater difficulty in adjudging upon a demurrer to the whole declaration that one count is good and another bad, than in doing the same thing in a court of error, after the proceedings have been embarrassed by a judgment which is admitted to be erroneous to the extent of requiring a partial reversal. If, indeed, the court below is bound to give judgment *generally*, upon the whole record where the defendant demurs to a good and a bad count, there seems to be no reason why a court of error should not affirm a judgment *generally*, when the declaration contains a good and a bad count, and error is assigned upon the whole judgment, the assignment of error being in such case *too large*. As to which see *Trevor* v. *Wall*, 1 *T. R.* 151.

Upon the authority of the cases in the Exchequer, antecedent to *Brydell* v. *Jones*, 4 *M.* & *W.* 446 (not then argued), the Court of Queen's Bench, appa-

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chequer, in *Ward* v. *Byrne*, is a void covenant. You must stand upon the first breach.]

With respect to that breach, there is here an actual demise of the privilege of supplying ale. [*Tindal* C. J. Is that capable of being demised?] It is in effect a covenant that the privilege, so far as the defendant is concerned, shall be confined to the plaintiffs. The defendant afterwards transfers the public house to *Golland*, and puts it out of his own power to perform the covenant, which formed part of the consideration for the payment of the annual sum of 500*l*. [*Tindal* C. J. There is no covenant to the effect, that after making the demise, the defendant should continue to occupy the *Punch Bowl*.] He might not be bound to live there, but he ought to have taken care to do nothing in breach of the agreement. No particular form of words was necessary to express the intention of the parties, that the plaintiffs should carry on the defendant's business, paying him a yearly sum. Although the arrangement is, in form a demise, it is, in effect, an agreement. [*Tindal* C. J. The only word used is "demise." Has that word ever been held to amount to a covenant, except when connected with land?]

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rently without much discussion, adopted the expression — of giving judgment *against the demurrer* as being *too large* — in a case in which it is observable that the plaintiff was, on other grounds, entitled to a general judgment in his favour; *Webb* v. *Baker*, 7 *A. & E.* 841, 3 *N. & P.* 87.

Even in the Court of Exchequer, however, the doctrine of large demurrers appears to have undergone a certain degree of modification, *Brydell* v. *Jones*, *ubi suprà*; and, even supposing the practice of pronouncing a judgment which must be altered before it can be either entered or acted upon, to continue, it is probable that no further accommodation of the rules of pleading at common law, to the more loose and indistinct system of the courts of equity, will take place. *Vide Spicer* v. *Teesdale*, 2 *Bos. & Pull.* 49; *Cuming* v. *Hartnell*, 1 *Alcock & Napier*, 149; *Cutforthay* v. *Taylor*, *Sir T. Raym.* 395; *Danv. Abr.* iii. 79, *Vin. Abr.* x. 7, xx. 557; *Bac. Abr.*, *Pleas & Pleading* (B. 6.); 4 *Dowl. P. C.* 524. (b).

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If the intention of the parties can be fairly collected from the deed, the Court will give effect to it, for there is no objection in point of law to the defendant's granting such a privilege for a valuable consideration.

Whitehurst, in reply, was directed by the Court to confine his argument to the first breach. There being no express covenant in the indenture for the enjoyment of the privilege of supplying ale to this public house, the plaintiffs seek to give an effect to the word demise (*a*) which it has never yet received. It is laid down in *Comyns's Digest*, *Covenant* (A. 4.) "If goods be demised by indenture for years; if the lessee be evicted covenant does not lie upon the word *demisi*, for the law does not create a covenant for a personal thing." So in *Bacon's Abridgment*, *Covenant* (B.), it is said "If a man leases certain goods for years, by indenture, which are evicted within the term, yet he shall not have a writ of covenant, for the law does not create any covenant upon such personal thing." (*b*) Here the privilege sought to be enforced is not attached to the premises, but is a personal thing, like the good will of a trade. If it had been the intention that the defendant and the succeeding occupiers of the public house should take their ale from the plaintiffs, a covenant to that effect would have been introduced in the indenture. But admitting that such an intention existed, it is sufficient to say that no covenant was in fact inserted. [*Bosanquet* J. There are authorities to shew that if a deed cannot operate in one way it may in another, so as to effectuate the inten-

(*a*) If the privilege could be considered as a subject *demised*, the plaintiff would not want the *implied* covenant which the law, in some cases, raises upon the word "demisi," inasmuch as the declaration (*antè* 196,) shews an *express* covenant for the quiet enjoyment of the subjects *demised*.

(*b*) For which is cited *Owen* 104. (*Bedford* v. *Bull*), *Roll. Abr.* 519. (1 *Roll. Abr.* 519, 6 *Vin. Abr.* 385.)

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tion of the parties.] (a) The fair inference from the indenture is, that it was intended that so long as the defendant occupied the public house he should get his ale from the plaintiffs, and on leaving it, take a covenant from the succeeding tenant that he would do the same. It is, therefore, submitted there was no agreement at all extending beyond the time of the defendant's own occupation. But supposing that there was such an agreement, how has it been broken? The breach assigned is, not that the defendant demised the public house to *Golland*, but that having done so, and having taken a covenant from *Golland*, it has been broken by the latter. If this be so, the plaintiffs have no right to sue the defendant, because *Golland* has broken the covenant made with him. [*Maule* J. It is not alleged in this breach that the ale was not brewed by the plaintiffs. It may have formed part of the stock of the defendant, and have been transferred by him to *Golland*, when the latter took the public house. It is certainly a suspicious circumstance that the plaintiffs do not aver that *Golland* got his ale from other brewers, but that he purchased it from the defendant and other persons.] Again, what is the privilege that the plaintiffs were to have? It was their duty to define it in the declaration. [*Erskine* J. The objection is, that according to the indenture, the defendant had one of two privileges, — an exclusive privilege or some other privilege then enjoyed by the defendant, — and the plaintiffs do not aver what privilege he had.]

Hoggins. The declaration shews that the defendant was the owner and occupier of the public house.

TINDAL C. J. Without entering into the question, whether the covenant, on which the first breach is sought to be founded, is to be implied or not, it appears to me,

(a) See the cases collected 2 *Wms. Saund.* 96 *b.* n. (1).

that such breach is not sufficiently assigned; for it is quite consistent with the allegation in the declaration, that the ale consumed in the *Punch Bowl* had originally come from the plaintiffs' brewery, having been first laid into some other public house, and afterwards removed to the *Punch Bowl*.

The third breach has been disposed of in the course of the argument, being assigned on a covenant, which, according to the case of *Ward* v. *Byrne*, is void in law.

BOSANQUET J. I am of the same opinion. The declaration ought to have shewn what the privilege of the defendant was.

ERSKINE J. The declaration not having stated of what the privilege consists, there is nothing to shew that any covenant with respect to it has been broken.

MAULE J. I am of the same opinion. It was necessary to make out that the defendant had the privilege which the plaintiffs complain of not having enjoyed. It is said that this is shewn, because the defendant is stated to be the owner and occupier of the public house. If that is any allegation at all, it is argumentative. A proper averment must be one which does not admit of any thing to the contrary. It is consistent with the allegation of the defendant's being the owner and landlord of the house, that he had not the exclusive privilege of supplying it with ale. Upon this ground, as well as on that mentioned by the Lord Chief Justice, I concur in the judgment which has been pronounced.

Judgment for the defendant. (*a*)

(*a*) Although the court was of opinion that the second breach could not be sustained, yet, as that breach was not covered by the demurrer, the *judgment* would apply to the first and third breaches only.

As to the degree of certainty

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required in a declaration and in a plea, see *Co. Litt.* 303 *a.*; *Com. Dig., Pleader* (C. 17—31.), (*E.* 5—11.); 4 *Vin. Abr., Certainty in pleading. Stephen on Pleading*, 4th ed. 143. 307. and section IV. *passim.*

As to the liability of an assignee upon a covenant by the lessee, or by a prior assignee for himself and his assigns, to buy beer of the lessor or assignor, see *James* v. *Blunck, Hardres*, 88; *Purfrey's Case*, Sir *F. Moore*, 243; *Hartley* v. *Pehall, Peake, N. P. C.* 131; *Gunniss* v. *Erhart*, 1 *H. Bla.* 289; *Holcombe* v. *Hewson*, 2 *Campb.* 391; *Jones* v. *Edney*, 3 *Campb.* 285; *Cooper* v. *Turbill, Ib.* 287.

A covenant to reside upon the demised premises binds the assignee, *Tatem* v. *Chapland*, 2 *H. Bla.* 133. So, though "assigns" be not mentioned in the covenant, *ibid. Secus* of a covenant not to permit certain persons to work there; *Mayor of Congleton* v. *Patterson*, 10 *East*, 130.

As to the plea of *non demisit*, see 3 *N. & M.* 50. (e).

April 22.
May 12.

WATTS *v.* BALL.

Copy of issue delivered, varying from the roll in date of year, and also in blanks being left therein for the teste and return of the writ of trial, amended upon payment of costs.

WILDE, S. G. had obtained a rule, calling upon the defendant to shew cause, why the copy of the issue delivered to him, should not be amended, by altering the year therein mentioned, from 1839 to 1840, and by inserting therein the date of the teste, and of the return, of the writ of trial. The writ itself, and the issue-roll, were correct. The defendant appeared at the trial by his attorney, who objected to the variance; but the under-sheriff decided that the cause should proceed, giving the attorney leave to move for a new trial; whereupon the latter defended under protest.

Channell, Serjt., had been instructed to move to set aside the proceedings for irregularity, and for a new trial, in pursuance of the leave reserved; but it was agreed, in order to save expense, that the whole matter should be considered under the present rule.

There can be no doubt that this is a variance which,

unless it can be amended, entitles the defendant to set aside the proceedings with costs; *Worthington* v. *Wigley* (*a*), *Wight* v. *Perrers* (*b*), *Blissett* v. *Tenant.* (*c*) In *Cox* v. *Painter* (*d*) the amendment was at the trial, and the court, though they held the judge had power to make it, seem to have given their opinion with some doubt. In *Farwig* v. *Cockerton* (*e*), the defendant, after his objection was overruled, did not protest against the trial going on; and it is rather a decision that the party was not in a situation to raise the objection, than that it was not good. In *Percival* v. *Connell* (*g*), where this court suspended a rule to set aside the writ of trial, for its variance from the writ of summons, in order to give the plaintiff an opportunity of applying to amend, it did not appear that the defendant had objected at the trial. But here an objection was made; and if the undersheriff had not given leave to move, the defendant must have withdrawn instead of defending under protest. At all events, the court will only amend upon payment of costs.

Wilde, S. G., in support of the rule. It may be admitted that the issue delivered was irregular, and that, according to the authorities which have been cited, the defendant is entitled to a new trial, unless the court will permit an amendment. Records are frequently amended by the judges at *nisi prius;* but the undersheriff had no such power in the present case, as the issue delivered to the defendant was not before him, and consequently the plaintiff is obliged to come to the court. The mistake with respect to the year is imma-

(*a*) 3 *Scott*, 555; 5 *Dowl. P. C.* 209.
(*b*) 5 *Dowl. P. C.* 463.
(*c*) 7 *Scott*, 749; 6 *Dowl. P. C.* 436.
(*d*) 1 *N. & P.* 581.
(*e*) 3 *M. & W.* 169.
(*g*) 3 *New Cases*, 877; 5 *Scott*, 91.

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terial; *Solomon* v. *Nainby*. (*a*) As regards the blanks in the issue delivered, the defendant had notice of the irregularity, and he is therefore entitled to less favour than he would have if this had been a case in which the errors could only be found out by comparing the issue with something else. This irregularity was no surprise on the defendant, neither could he be misled by it. The jurisdiction of the court with respect to amendments has always been liberally exercised; *Byfield* v. *Street* (*b*); and many cases have occurred in which amendments have been allowed in writs after trial, and also after execution. The amendment made in *Percival* v. *Connell* was of a much more important nature than that prayed for in the present case; and as the application ought not to have been opposed, it should be granted without payment of costs.

TINDAL C. J. It is proper that we should preserve a strict superintendence over proceedings like the present, and that where a substantial variance has taken place, it should be set right only by an application to the court. It seems to me, that this is a proper application, there being a discrepancy between the issue delivered and the writ of trial; and although it occurs in the part of the least possible consequence, I am not prepared to say that it is not a variance. I however see no objection to its being amended, on payment of costs.

The other Judges concurred.

Rule absolute accordingly.

(*a*) 7 *Dowl. P. C.* 459.

(*b*) 10 *Bingh.* 27; 3 *M.* & *Scott*, 406.

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May 11.

MEREWETHER, Serjt. had obtained a rule *nisi* for an attachment against the attorney of the plaintiff for not delivering to the defendant's attorney a specification, in writing, of the name and place of abode, together with the quality, profession, or occupation of the plaintiff, pursuant to a rule of court made on the 13th of *March* last. The affidavit on which the motion was grounded stated, "that on, &c., he (the deponent) served a copy of the rule hereunto annexed upon *J. S.*, who acted as the attorney or agent of the plaintiff in this action, by leaving such copy of the rule with him at his house, and, at the same time, producing and shewing to the said *J. S.* the original rule."

On a motion for an attachment against an attorney, for disobeying a rule of court, it is sufficient if it can be collected from the affidavit of service, that such rule has been personally served; it is not necessary that the words "personal service" should be used in the affidavit.

Talfourd, Serjt. now shewed cause, and contended, that the affidavit was defective in not stating expressly that there had been a personal service. It is not enough that the court may collect that there has been personal service, but the fact should be positively sworn to, and the word "personal" used in the affidavit.

TINDAL C. J. Nothing can be more express than the words of this affidavit. I do not think there is such magic in the word "personal" that it *must* be used; all that is required is, that the court should see there has been, in point of fact, a personal service.

Talfourd, Serjt. then submitted, that it was not the intention of the statute 2 *W.* 4. *c.* 39. that an attorney, not furnishing his client's name and address, should be

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liable to an attachment, but only that, in case of his neglect to do so, the proceedings should be stayed.

TINDAL C. J. Formerly parties were harassed by being served with writs, without being able to find out who the plaintiffs were. The object of the statute was to remedy this grievance; and, by the seventeenth section, attorneys, whose names are indorsed on writs, are to declare whether such writs have issued by their authority, and also, in case they are so ordered by the court, or by a judge, to declare in writing "the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the court from which such writ issued." Your attorney, therefore, by neglecting to furnish these particulars, was guilty of a contempt of this court.

The rule was subsequently discharged upon the merits, without costs.

Rule discharged.

April 24.

BAKER *v.* JUBBER.

A plea to an action of assumpsit, that the plaintiff drew, and the defendant accepted, a bill of exchange for 60*l.*, in satisfaction of the plaintiff's demand, is not supported by evidence that the defendant transmitted to the plaintiff a blank acceptance, with 60*l.* in figures, written in the margin, which the plaintiff altered and filled up as a bill for 46*l.* before he signed his name to it as drawer.

ASSUMPSIT on a bill of exchange for 46*l.*, dated the 29th *January* 1839, drawn by the plaintiff upon, and accepted by, the defendant, and payable nine months after date. The declaration also contained counts for goods sold and delivered, and upon an account stated.

The defendant pleaded — first, to the first count —

that he did not accept the said supposed bill of exchange in manner and form, &c. Secondly, to the second and third counts — *non assumpsit*, except as to 66*l.* 6*s.* 4*d.*, parcel, &c. Thirdly, as to 60*l.* parcel of the said sum of 66*l.* 6*s.* 4*d.* parcel, &c.: that after the making of the said promises, as to the said sum of 60*l.* parcel, &c., and before the commencement of the suit, to wit, on the 29th *January* 1839, an account was stated by and between them, the defendant and the plaintiff, of and concerning so much of the causes of action in the said second and third counts mentioned as related to the sum of 60*l.* parcel, &c., and, upon that accounting the defendant was found to be in arrear, and indebted to the plaintiff in the said sum of 60*l.* parcel, &c., and thereupon afterwards, to wit, on the day and year last aforesaid, the plaintiff, for and on account of the said sum of 60*l.* parcel, &c., and the said promises in respect thereof, made and drew his bill of exchange in writing, bearing date the day and year last aforesaid, and thereby required the defendant nine months after the date thereof, to pay to the plaintiff, or order, the sum of 60*l.* for and on account of the said sum of 60*l.* parcel, &c., and the said promises in respect thereof, and the defendant then accepted the said bill so drawn as last aforesaid, and delivered the same to the plaintiff, and the plaintiff then took and received the same for and on account of the said sum of 60*l.* parcel, &c., and the said promises in respect thereof. Verification. Fourthly, as to 6*l.* 6*s.* 4*d.*, residue of the 66*l.* 6*s.* 4*d.*, parcel, &c., payment into court of 6*l.* 6*s.* 4*d.*, and no damages ultra 66*l.* 6*s.* 4*d.* (*a*)

Replication to the third plea, that the plaintiff did not, for and on account of the said sum of 60*l.* parcel, &c., and the said promises in respect thereof, make and

(*a*) *Vide Thompson* v. *Jackson*, *post*, 242.

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draw the said bill of exchange, and thereby require the plaintiff nine months after the date thereof to pay to the plaintiff, or order, the sum of 60*l.* for and on account of the said sum of 60*l.*, parcel, &c., and the said promises in respect thereof, in manner and form, &c., — concluding to the country. Upon the fourth plea the plaintiff took the 6*l.* 6*s.* 4*d.* out of court.

At the trial before *Tindal* C. J., at the sittings in *London* after last *Hilary* term, it appeared that the plaintiff and defendant were wine-merchants, the former residing in *London*, and the latter at *Oxford*. In the years 1837 and 1838, the parties had dealings together, in respect of which the plaintiff claimed a balance as due to him, of 66*l.* 6*s.* 4*d.* In *January* 1839 the plaintiff wrote to the defendant, requesting him to send up his acceptance for such an amount as he might think correct, and added, "We can draw it here." In reply to this letter, the defendant transmitted to the plaintiff an acceptance in the following form: —

"29th *Jan.* 1839.

"60*l.* 0*s.* 0*d.*

"Nine months after date pay to the order of myself the sum of sixty pounds, value received.

"*Accepted payable at Jones and Lloyd's, London.*" "*James Jubber.*"

Upon the receipt of the above document, the plaintiff altered the figures in the margin, and filled it up as a bill of exchange for 46*l.* Afterwards, on being presented at the bankers, it was dishonoured.

The document being produced by the plaintiff at the trial, the Lord Chief Justice was of opinion that it did not sustain the third plea, and under his direction a verdict was returned for the defendant upon the first and second issues, and for the plaintiff on the third; but his Lordship gave the defendant leave to move to have the verdict entered for him upon that issue also.

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Talfourd, Serjt. now moved accordingly, and contended that the proof given of the making of the bill satisfied the allegations of the third plea. The plaintiff, by his letter, left it to the defendant to fix the amount of the bill. [*Tindal* C. J. Can it be said that the plaintiff drew a bill for 60*l.*, when nothing came from the defendant but a blank acceptance, which the plaintiff filled up for 46*l.*? In *Saunderson* v. *Piper* (*a*), where a bill was expressed in figures in the margin to be drawn for 245*l.*, and in words in the body of the bill for 200*l.*, it was held by this Court to be a bill for the latter amount. *Bosanquet* J. Could the defendant have been sued upon this bill as an acceptor for 60*l.*?] It is submitted that, coupling the plaintiff's letter with what was done by the defendant, the bill was complete when the defendant wrote his acceptance across it; for the order of time in which the names of the drawer and acceptor of a bill of exchange are placed upon it are immaterial: *Molloy* v. *Delves*. (*b*) The subsequent alteration of the bill by the plaintiff was an unauthorised act, he having no more right to make it of smaller amount than he would have had to insert a larger sum.

TINDAL C. J. The difficulty in this case arises from the terms of the plea, in which the defendant states that the plaintiff drew a bill upon him for 60*l.*, which he accepted. It appears by the correspondence between the parties, that the plaintiff requested the defendant to send him up an acceptance for such an amount as he thought correct, adding, "We can draw it here." The drawing therefore was to be by the plaintiff in *London*. The document sent up by the defendant was a blank acceptance, for at that time there had been no drawing

(*a*) 5 *New Cases*, 425. (*b*) 7 *Bingh.* 428.; 5 *M. & P.* 275.; 4 *C. & P.* 492.

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of the bill, and no drawer's name was attached to it. Upon the receipt of the document, the plaintiff drew the bill for 46*l.* How can that be said to be a drawing of a bill by the plaintiff for 60*l.*, which the defendant accepted?

BOSANQUET J. I think that the bill produced at the trial did not support the allegations of the third plea.

COLTMAN J. It is impossible to contend that the document transmitted to *London* by the defendant was a bill of exchange; and if so, the plaintiff never drew such a bill as that set forth in the third plea.

ERSKINE J. If the plaintiff had filled up the document for 60*l.*, the order in which the drawing and acceptance took place would have been immaterial; but in point of fact there never was a bill for 60*l.* drawn by the plaintiff upon the defendant.

Rule refused.

May 11.

THOM *v.* CHINNOCK.

The affidavit in support of a motion by a defendant, to enter a suggestion for double costs under the *Middlesex* County Court Act, 23 *G.* 2. *c.* 33. *s.* 19, need not state that the cause of action arose within the jurisdiction of the county court, but it is sufficient if it appear that the defendant at the time of action brought resided within such jurisdiction, and the defendant will be entitled to have a suggestion entered, unless it be shewn by the other side that part of the cause of action arose out of the jurisdiction.

Where part of the cause of action appears to have arisen out of the jurisdiction of the county court, the court will not allow a suggestion to be entered.

CHANNELL, Serjt. had obtained a rule calling upon the plaintiff to shew cause why a suggestion should not be entered on the record under the *Middlesex* County

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Court Act, 23 G. 2. c. 33. s. 19. (a), in order to entitle the defendant to double costs, the plaintiff having, at the trial of this action before the sheriff, recovered less than 40s.

The affidavit on which the rule was grounded stated that "the defendant, at the time of the commencement of this action, was, and ever since has been, and still is, residing and inhabiting in the county of *Middlesex* (b), within the jurisdiction of the county court of *Middlesex*, and that he hath been, for and during all that time, and still is, liable to be summoned to the said county court." It is also alleged that the plaintiff, at the trial, obtained a verdict for 1*l.* 7*s.* 5*d.*, and no more; and that, as the damages found by the jury were under 40*s.*, the same were recoverable in the said county court.

Stephen, Serjt. showed cause, and took two preliminary objections. He contended, that the affidavit on which the rule had been obtained was defective, inasmuch as it did not contain an allegation that the cause of action arose within the jurisdiction of the county court of *Middlesex*. (a) He also submitted, that the nineteenth section of the statute did not apply to causes tried before the sheriff, but applied only to those tried in the superior courts at *Westminster*.

Channell, Serjt. contrà. Both the objections now taken were decided in the case of *Bishop* v. *Marsh*. (c) It was there held, that an affidavit in support of a motion like the present, need not state that the cause of action arose within the jurisdiction of the county court; and that it is sufficient, in the first instance, if it be sworn, that the

(a) For the nineteenth section, and also for the fourth section of the 23 *G.* 2. *c.* 33. see 6 *New Cases*, 13.

(b) *Mansfield* v. *Brearey*, 1 *A.* & *E.* 351.

(c) 6 *New Cases*, 12. See also *Turner* v. *Bernard*, *Tyrwh.* & *G.* 942.

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party sued resides within such jurisdiction. It was likewise ruled that the statute applies to actions tried before the sheriff.

Stephen, Serjt. then produced an affidavit by the plaintiff's attorney, which stated that the action was brought to recover the sum of 12*l.* 15*s.* 11*d.*, and that in his particulars of demand the plaintiff claimed 1*l.* 16*s.* for two weeks' wages, together with a balance of 19*s.* 11*d.* for travelling expenses in making a journey to *Maidenhead* on behalf of the defendant, amounting, in the whole, to 2*l.* 15*s.* 11*d.*, but giving credit for 15*s.* which had been received, as appeared by a more detailed account subjoined. The affidavit, after shewing the nature of the pleadings, stated that the under-sheriff directed the jury that, under the first count of the declaration (which was for wages due to the plaintiff for service performed as the hired servant of the defendant), they could only give one week's wages, namely, 18*s.*, and "that the jury thereupon gave their verdict for 1*l.* 7*s.* 5*d.*, being 18*s.* for wages and 9*s.* 5*d.* on account of the other items claimed as above stated, to the best of deponent's knowledge and belief." The affidavit concluded by stating "that the plaintiff's cause of action herein, as proved by the evidence given in this cause, did not arise wholly in the county of *Middlesex*, but was for services performed, and payments made, partly in the county of *Middlesex* and partly in the county of *Berks*, as is hereinbefore specifically stated and set out in detail."

It clearly appears from this affidavit that part of the cause of action did not arise in the county of *Middlesex*. The question then is, was the plaintiff bound to sue in the *Middlesex* county court, he not being able to recover his whole demand there? The act could never intend that where a party has a claim

arising in *Berkshire* and another in *Middlesex*, he must bring separate actions to recover them in the county courts. [*Tindal* C. J. The plaintiff could not have recovered the claim arising in *Berkshire* in the county court, he not residing within that county.] Then he must either be at liberty to sue in the superior courts, or must forego his demand in *Berkshire* altogether. (*a*)

Channell, Serjt., contrà. The plaintiff has not satisfied the obligation that was thrown upon him by the defendant's affidavit. The plaintiff relies on the proviso contained in the fourth section of the statute; it was therefore incumbent on him to bring himself within it: *per Tindal* C. J. *Bishop* v. *Marsh.* (*b*) It may be admitted, that it must appear that the whole of the plaintiff's demand might have been recovered in *Middlesex;* but it is submitted that the plaintiff has failed to make out that his entire claim could not have been recovered in that county. It may be true, that part of the services were rendered in *Berkshire*, so as to satisfy an undertaking to give material evidence in that latter county. But there is strong evidence on the plaintiff's affidavit to shew that the contract was made in *Middlesex.* It is laid down in *Dalton's Sheriff*, c. 110. p. 412., that "sheriffs, in their county courts, may examine, hear, and determine certain smaller personal actions, as of debts due upon contracts, &c., assumpsit, &c., happening, made, or done within their county." (*c*) If, therefore, the contract, in the present case, was made in *Middlesex*, the plaintiff would not be debarred from suing for it there, because part of it was performed in *Berkshire.* [*Tindal* C. J. Is that so? Is there not a case of *Welsh* v.

(*a*) As to which point, see *Wright* v. *Nuttall*, 10 *B.* & *C.* 492.; 5 *Mann.* & *R.* 454.; *Sandal* v. *Bennett*, 2 *A.* & *E.* 204.; 4 *N.* & *M.* 89., and the cases collected and observed upon in 4 *N.* & *M.* 94. note (*a*).

(*b*) 6 *New Cases*, 15.

(*c*) This is one of the numerous additions to *Dalton* from *Finch.*

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Troyte (*a*) upon this point?] In *Harwood* v. *Lester* (*b*) goods under the value of 40*s.* were delivered to a carrier in *London*, pursuant to an order from the defendant, who resided in *Leicestershire*, and who received the goods in the latter county. It was held that no action could be maintained for the goods in the county court of *Leicestershire*. The judgment of the court there went on the ground that the contract was complete on the delivery of the goods to the carrier. [*Tindal* C. J. Here the contract is made in *Middlesex*, but part of it is performed in another county. I have always thought that not only must the contract be entered into, but the services under it must be rendered in the same county, to entitle the party to sue in the county court.] Without disputing that proposition, it is submitted that the onus was thrown on the plaintiff to shew that he could not recover the whole of his demand in *Middlesex*; but, instead of swearing positively, he has left the point in doubt. [*Erskine* J. The disbursement at *Maidenhead* did not arise out of any contract. The promise to pay that arose out of the fact of payment.] It might be part of the contract that the plaintiff was to pay all reasonable charges incurred upon his journey.

TINDAL C. J. The affidavit of the plaintiff's attorney states positively that part of the subject-matter for which the action was brought arose within the county of *Berks*. The rule is, that no action can be instituted in the county court unless both the defendant resides and the cause of action arises within its jurisdiction. What is the meaning of the term "cause of action?" It cannot be restricted to the mere contract, or to the making of the promise, which is commonly an inference of law. The present case falls within the general rule, with respect to inferior courts, that every part of the cause of action

(*a*) 2 *H. Bl.* 29. (*b*) 3 *B. & P.* 617.

should appear to be within the jurisdiction of the court, and therefore the consideration should be laid (*a*), and should be proved to have arisen, within such jurisdiction. It is not necessary to cite authorities; but the first of these propositions is to be found in *Comyns's Digest*, tit. *County* (C. 8.), and the latter is the result of many cases which are referred to by Mr. Serjt. *Williams* in a note to *Peacock* v. *Bell.* (*b*) It seems to me, therefore, that it does sufficiently appear in this case that the cause of action did not arise exclusively in the county of *Middlesex*, and consequently the County Court Act will not apply.

BOSANQUET J. I am of the same opinion. It is sufficiently stated in the affidavit that a part of the cause of action arose out of the county of *Middlesex*; and that a portion of the sum recovered was given in respect of such part of the cause of action.

COLTMAN J. Although I assented to the recent decision in *Bishop* v. *Marsh*, that the defendant is not bound, in the first instance, to show affirmatively that the cause of action arose within the inferior court, yet I think he ought, in a case of any doubt, to bring the question distinctly before the court. That not having been done here, the matter must be decided upon the affidavit produced on the part of the plaintiff, which states positively that part of the cause of action arose in *Berkshire* and part in *Middlesex*.

ERSKINE J. I am also of opinion that it sufficiently appears that part of the cause of action arose out of the county of *Middlesex*, and consequently that this rule must be discharged.

Rule discharged.

(*a*) *Vide antè*, 22. (*b*) 1 *Wms. Saund.* 74 *a.*

April 25.

EDGELL *v.* FRANCIS.

In an action for false imprisonment, where a verdict with 200*l.* damages was given for one night's confinement in a prison, evidence of a trespass by the defendant on the goods of the plaintiff, arising out of the same transaction committed on the following day, was admitted for the purpose of shewing that the defendant was actuated by *malice*,— Held, to be no ground for granting a new trial.

TRESPASS and false imprisonment. Plea, Not Guilty. At the trial, before Lord *Abinger* C. B., at the last assizes for the county of *Surrey*, it appeared that the plaintiff was the secretary of the London Trades Joint Stock Banking Company, of which the defendant, who resided at *Dorking*, was one of the directors. In 1839 the Company, whose principal establishment was in *London*, opened a branch at *Dorking*, and appointed a person of the name of *Newham* to transact the business there. On the 26th of *August* 1839, the defendant returned from *London* to *Dorking*, about eight o'clock in the evening, and observing a light in the branch bank, he proceeded there, and found the plaintiff, and *James*, the cashier of the *London* bank, employed in removing the books and the money, *Newham* being present, but taking no part. The defendant demanded of the plaintiff and *James* their authority, when they produced a paper in the handwriting of one of the directors of the Company, but without signature, which purported to be an order on *Newham* to deliver up to them the books, papers, and money in his possession. The defend-

The defendant having, in mitigation of damages, adduced evidence of the state of accounts between himself and the owners of the fund which the plaintiff was removing, under an irregular order, at the time of his being given into custody, and the jury having been told that the fact shewn was no mitigation of the defendant's conduct, the defendant's witnesses were allowed to be cross-examined as to bill transactions between the defendant and the owners of the fund, for the purpose of negativing the state of accounts set up by the defendant, although it was objected that such an inquiry could not be gone into unless the bills were produced: — Held, to be no ground for granting a new trial.

To induce the court to grant a new trial, on the ground of excessive damages, it must be shewn that they are very excessive, or that a perverted view of the case has been taken by the jury.

ant, finding that the plaintiff and *James* were determined to act upon the alleged order, called in a policeman, and gave them into custody, upon a charge of robbing the bank. After being handcuffed, the policeman took them to the cage (*a*), where they were locked up until the morning, when they were brought before a magistrate and discharged.

On the part of the plaintiff evidence was offered that, early on the following morning, the defendant went to the *London* establishment and broke open the desks of the plaintiff and *James*, from which he took away some papers. For the defendant it was objected, that this evidence was inadmissible, being irrelevant, and forming no part of the transaction in respect of which the action was brought. The Lord Chief Baron thought it tended to shew malice on the part of the defendant towards the plaintiff, and admitted the evidence.

The defendant, in order to prove that he acted *bonâ fide* to protect his own interest, gave evidence, that, by the rules and regulations of the Company, the order, under which the plaintiff and *James* professed to act, could not have been duly made at a regular meeting of the directors, — and that, at the time in question, the cash in the banking house at *Dorking* did not amount to more than 180*l.*, which, with the exception of about 5*l.*, was composed of the defendant's balance.

The Lord Chief Baron was of opinion that the above facts formed no justification or mitigation of the defendant's conduct; and he likewise allowed one of the defendant's witnesses to be cross-examined as to various bill-transactions of the defendant with the parent bank, although it was objected that if it was intended to be shewn that the defendant was indebted to the parent bank on particular bills, they must be produced and proved to have been dishonoured.

(*a*) From the *Spanish* "*jaula*," a cage, (derived from *caula*,) we have *géole*, gaol.

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The jury having returned a verdict for the plaintiff, damages 200*l.* (*a*),

Shee, Serjt. now moved for a new trial, on the ground that evidence had been improperly received, and also that the damages were excessive.

The evidence given of what the defendant did on the morning after the transaction complained of was wholly irrelevant, and had the effect of prejudicing the minds of the jury, the object being to shew that the defendant was a violent character, and that he broke open the desks in order to deprive the plaintiff and *James* of the means of justifying their conduct.

The evidence with respect to the bill-transactions was inadmissible; and, even if admissible, it afforded no proof that the bills were discounted for the defendant.

The damages were excessive, the plaintiff having sustained no injury in his character, and it being clearly shewn that the order under which the plaintiff and *James* acted, had been irregularly made, and that the defendant, although his conduct had been hasty, had not been actuated by malicious motives, but had merely sought to protect his own interests and property. (*b*)

TINDAL C. J. I see no reason for granting a new trial in this cause, on the ground of the improper recep-

(*a*) In another action against the defendant (who called no witnesses), *James*, the cashier, recovered 150*l.* damages. The learned serjeant moved in both causes.

(*b*) In trespass for false imprisonment, *malice* appears to form no part of the cause of action. However fairly and considerately the defendant may have acted towards the plaintiff, if the imprisonment turn out to be illegal, the defendant ought to render compensation to the plaintiff, to the full extent of the damage which the latter has sustained by reason of the illegal act of the former. It would rather seem that damages reduced below that amount, in favour of the *bona fides* of the defendant, would be *inadequate* damages, and that any thing exceeding that amount, given in respect of the malice of the defendant, would be *vindictive* damages.

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tion of evidence. The first objection is, that evidence was admitted that, early on the morning after the transaction occurred out of which the present action arose, the defendant went to the banking house of the company in *London*, and there broke open certain desks from which he took away papers; and it is alleged that this evidence was tendered, with the view of inducing the jury to believe that the defendant wished to deprive the plaintiff and *James* of the means of justifying their conduct. I cannot say that what the defendant did upon that occasion, following so closely upon the transaction of the previous night, is so irrelevant as to furnish ground, by its reception, for a new trial. You can never strip a case so close as not to let in evidence of the party's conduct immediately before and after the occurrence which forms the subject-matter of complaint; and here it seems to me of little consequence whether the questions as to what the defendant did the next morning were put or answered.

With respect to the other evidence to which exception is made, I think it was relevant. It was part of the defendant's case, and was proved by him in evidence, that on the night in question the money at the branch bank consisted almost entirely of his own balance. As he insisted upon that as a ground for keeping down the damages, it was surely open to the plaintiff to ask whether the defendant was not indebted to the parent bank in a larger sum. If this had been sought to be proved by inquiries as to particular bills, I agree that it could not be done without producing the bills themselves; but I do not find that the objection ever assumed that tangible shape.

With respect to the damages the court never interferes, unless they are very excessive, or a strong case is made out that the jury have taken a perverted view of the matter. I am not prepared to say that the damages

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in this case are so large as to call for our interposition. The defendant sought to shew that he acted under a *bonâ fide* belief that the plaintiff and *James* were about to rob the bank. But both parties were known to him; they attempted no secrecy in what they were doing; and *Newham*, the clerk, who had the charge of the bank, was standing by. Was the defendant justified in treating them as persons who had come to commit a robbery? The defendant seems to have yielded to his passion, and without any reasonable cause to have given the parties in custody upon a charge of felony. He is therefore responsible for all that was done by the officer in the ordinary discharge of his duty.

BOSANQUET J. I also think that sufficient ground has not been laid before the court for disturbing the verdict in this case. The conduct of the defendant in going to the bank in *London* the morning after does not appear to me to be so unconnected with the transaction as that it ought to have been excluded. With respect to the other evidence which was objected to, namely, the enquiries made on the part of the plaintiff as to bill transactions between the defendant and the *London* bank, I think it was competent to the plaintiff to shew that there were other dealings between the parties which might turn the balance which the defendant proved he had at the branch bank, the other way. There does not seem to have been any specific objection raised as to inquiries with regard to particular bills, and I am of opinion the plaintiff was at liberty to give the general evidence which was admitted.

The amount of damages is a question for the jury. It is their province to estimate them; and unless the court see that they are extravagant, it will not interpose. In the present case we must look, not only at the fact of the plaintiff's being put into confinement, but at the

charge on which he was given in custody. A more grave charge, against a party in the plaintiff's situation of life, cannot well be imagined, than that which the defendant thought fit to make against him; and if the jury had given him small damages, his character might have been affected. It has been said, that the officer handcuffed the plaintiff, of his own accord; but the defendant was present, and does not seem to have remonstrated; and, considering the nature of the accusation, the officer cannot be said, in taking that precaution, to have exceeded his duty.

COLTMAN J. I do not think that the conduct of the defendant, on the following morning, was so disconnected with the transaction as that it was incompetent for the plaintiff to bring it forward. First point.

With respect to the question as to the dealings of the defendant with the parent bank, the case would have been different if the inquiries had been directed to specific bill transactions between the parties, instead of being confined, as they appear to have been, to eliciting general evidence, tending to shew that the defendant might be indebted to the parent establishment in a larger sum than the balance due to him at the *Dorking* branch. Second point.

With respect to the damages, I cannot say, considering the circumstances of the case, that the jury have given an extravagant sum.

ERSKINE J. The evidence on both points, which has been excepted to, seems to me to be relevant.

With respect to the bill transactions of the defendant with the parent bank, the objection does not appear to have assumed any definite shape at the trial. Second point.

As regards the damages, the question for the jury was, not what the defendant could afford to pay, but what was Damages.

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a fair compensation to the plaintiff for the injury he had received; and I do not see that the jury have awarded greater damages than they ought to have done.

Rule refused.

April 24.

ELIZA MOSS *v.* SETH SMITH.

In an action against a bailee for damaging some goods, and neglecting to redeliver others, a bill of particulars is delivered, containing a list of articles damaged, and also a list of articles not re-delivered. The plaintiff cannot recover, as for goods not redelivered, in respect of glass sent back in a broken state.

A Jewish divorce cannot be proved, without producing the document of divorce delivered by the husband to the wife, per *Erskine* J.

ASSUMPSIT. The declaration stated that, in consideration that the plaintiff, at the request of the defendant, had then caused to be delivered to the defendant certain goods and chattels of the plaintiff, to wit, (enumerating various articles of household furniture, wearing apparel, &c.), of great value, to wit, of the value of 2000*l.*, to be taken care of, and safely and securely kept, by the defendant for the plaintiff, until the plaintiff should request the defendant to re-deliver the same to the plaintiff, for hire and reward, to be therefore paid by the plaintiff to the defendant in that behalf, the defendant promised the plaintiff to take due and proper care of the said goods and chattels while the same should be in the defendant's care and keeping as aforesaid, and to re-deliver the same to the plaintiff whenever the defendant should be thereunto requested by the plaintiff.

First breach, that although the defendant received the said goods and chattels from the plaintiff, for the purpose aforesaid, and had the same in his keeping from thence and until 1st *June* 1839, yet the defendant did not take due &c., but on the contrary thereof, during all such time as last aforesaid, took so little care thereof, that

Quære, the effect of such a divorce upon the civil status of the parties.

Quære, whether, under the plea of *non assumpsit*, coverture, existing at the time of the contract, can be set up, since the new rules of pleading, *R. H.* 4. *W.* 4.

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by and through the mere negligence, carelessness, and improper conduct of the defendant, in that behalf, divers of the said goods and chattels, to wit (enumerating them), during the time last aforesaid, became and were greatly spoiled, broken, and damaged, and so remained and continued, and were, until the same afterwards, to wit &c., were, on request of the plaintiff in that behalf, re-delivered by the defendant to the plaintiff, so spoiled, broken, and damaged.

Second breach, that, although the defendant was afterwards, to wit on, &c., requested by the plaintiff to re-deliver to her the said goods and chattels first mentioned and described; and although a reasonable time for the re-delivery of the said goods and chattels to the plaintiff had elapsed; yet the defendant did not re-deliver the said goods and chattels to the plaintiff, but, on the contrary thereof, the defendant refused and still refuses to re-deliver to the plaintiff divers goods and chattels, parcel of the first mentioned goods and chattels, to wit (enumerating them), of great value, to wit, of the value of 500*l.*, and the same goods and chattels thereby became and were and are wholly lost to the plaintiff.

Plea—first, *non assumpsit*. Further plea to first breach, that the defendant did take due and proper care of the said goods and chattels while the same were in his care and keeping. Further plea to second breach, except as to so much thereof as relates to the said neglect and refusal to re-deliver the said two bath stoves, &c., part of the said goods and chattels mentioned in the second breach, that the defendant did re-deliver the same to the plaintiff when he was so requested as aforesaid. Further plea as to the second breach, so far as the same relates to the said neglect and refusal to deliver the said two bath stoves, &c., that the defendant hath kept and retained, and still keeps and retains the same at the request, and by the command, and under the permission

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and authority, of the plaintiff to the defendant, on &c., in that behalf made and given.

The replication joined issue upon the first, second, and third pleas, and as to the fourth plea, took issue upon the allegation that the defendant kept and retained the said goods and chattels mentioned in the fourth plea at the request, and by the command, and under the permission and authority, of the plaintiff.

Particulars of goods damaged, and also particulars of goods omitted to be returned, were delivered by the plaintiff, under a judge's order.

At the trial before *Erskine* J., at the sittings at *Westminster* after last *Hilary* term, the following facts appeared: — The plaintiff, being about to change her residence, in *June* 1837, applied to the defendant, the builder and owner of a large establishment, near *Belgrave Square*, called the *Pantechnicon*, a portion of which is fitted up with about 150 separate rooms for the reception and warehousing of furniture and other articles, the sides and flooring of each room being of iron, the ceiling of iron rods, covered with a fire-proof composition, and the entrance to each room being by an iron-grated door, with a lock, the only key to which is kept by the depositor of goods therein; the entrance to this range of rooms is by another iron-grated door, with two keys, one kept by the warehousemen, and the other by the superintendent of the warehousing department. The terms of warehousing having been stated, the plaintiff requested that some persons from the *Pantechnicon* should be sent to her house in *Connaught Terrace*, to pack the furniture; this, though at first objected to, was at last agreed upon, and the goods were packed by the defendant's servants. Other goods were sent by the plaintiff to be deposited in the same room in *July* 1837, and an inventory of the whole was retained by the plaintiff. The goods remained at the *Pantechnicon* until

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May 1839, but in the interval the plaintiff had access to, and at different times took away, the dresses for temporary purposes. Such goods mentioned in the first breach, as were shewn by the plaintiff to be damaged, appeared, upon further inquiry, to have been injured before they were removed from the plaintiff's house, or after they had been re-delivered to her, or from the careless manner in which the dresses had been moved. The goods mentioned in the second breach were shewn to have been re-delivered to the plaintiff, with the exception of those specified in the last plea, in respect of which it was proved that the plaintiff, having no further occasion for them, requested that they might remain at the *Pantechnicon* until they could be put into some sale.

In the "particulars of, goods omitted to be re-delivered" was an item of "twenty drops, and other parts, of one lustre." The lustre, with its appendages, had been packed in a hamper and two baskets, which were forced open by the plaintiff's servants in the absence of the defendant's servants, who opened the remainder of the packages. After the unpacking of the hamper and baskets, it was discovered that some of the drops were broken and others cracked; but it did not appear in what manner the breakage, which was ascribed by the plaintiff to want of care in the conveyance, and by the defendant to the unskilfulness of the plaintiff's servants, had been occasioned. The learned Judge told the jury that however the injury might have arisen, the drops, having been brought back in specie to the plaintiff, could not be said to be "goods not re-delivered," as stated in the second breach; or "goods omitted to be re-delivered," as stated in the second bill of particulars; especially as the declaration contained a breach in respect of goods "spoiled, broken, and damaged."

Jewish divorce.

In the course of the trial, it appeared, upon the cross-examination of the plaintiff's son, that he had

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known his father, *David Moss*, and his mother cohabiting as man and wife from his infancy, till six or seven years ago, when they separated, and when, as he understood, they were divorced, and that *David Moss* was still alive. Upon this, it was objected by *Bompas* and *Manning*, Serjeants, and *Watson*, for the defendant, that the plaintiff must be taken, upon the evidence, to have been a married woman at the time of the contract declared on, and therefore not entitled to sue. It was contended by *Talfourd*, Serjt., and *S. Martin*, for the plaintiff, that this objection was not open to the defendant, since the new rules, under the plea of *non assumpsit* (*a*). The plaintiff's counsel, however, undertook to shew that the marriage of the plaintiff was a marriage in which both the parties were Jews; that it had been solemnised according to the Jewish ritual, and had been put an end to by a Jewish divorce (*b*), before the period of the contract declared upon. For this purpose, Dr. *Solomon Hirschel*, chief rabbi (commonly called *high priest*) of the German Jews in *England*, and other subordinate officers in the synagogue, were called. The

(*a*) "In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. *Ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration (Vide *Alcock* v. *Taylor*, 6 *Nev. & M.* 298.), either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, duress, and various other defences, must be pleaded." If, with a view to costs, it had been thought advisable to move for leave to enter a verdict for the defendant on this plea, the question would have been, whether the rule applies to coverture arising after the contract only, or whether it extends to coverture existing at the time of the contract, when, in point of law, there would be, either no contract at all, or a contract between the husband and the defendant; and see *Meyer* v. *Haworth*, 8 *Ad. & Ell.* 467., 3 *Nev. & P.* 462.

(*b*) As to Jewish marriages and divorces, see *Ganer* v. *Lady Lanesborough*, *Peake*, *N. P. C.* 17.; *Lindo* v. *Belisario*, 1 *Hagg.* 216.; *Levi's Ceremonies of the Jews*, 146.; *Marks's Narrative*, p. 33.; *infrà*, 233. (*a*).

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Book of Divorces, kept by the superintendent of the synagogue in *Brookes's Gardens*, containing an entry of the divorce, in Hebrew, was produced by the superintendent, who was present at this divorce; but it also appeared, from the evidence of Dr. *Hirschel*, that, to constitute a valid divorce, under the laws and usages of the Jews, a written document of divorce (*a*), must be delivered from the husband to the wife; and that the delivery of this document is the operative part of the ceremony, which must, however, take place in the presence of the high priest, and of ten persons, at least. This document of divorce, which is attested by two witnesses, may be retained by the wife, but it is more frequently handed over by the wife to the high priest. This document was not produced by the plaintiff, and the high priest stated that he had not been requested to bring it with him.

Upon this evidence, it was contended for the defendant, first, that although Jewish marriages are excepted out of the marriage act (*b*), yet, by the common law, a marriage, whether Jewish or Christian, if once validly contracted, can be dissolved only by act of parliament (*c*);

(*a*) Ἀποστάσιον, Matth. v. 31. βιβλίον ἀποστασίου, Matth. xix. 7. Mark, x. 4. Deut. xxiv. 1. and 3. apud LXX.; rendered "Libellus divortii," and "Libellus repudii," *Vulg.*, and "Writing of divorcement" and "Bill of divorcement," *King James's Transl.* See the form of a Jewish bill of divorcement, *Selden, Uxor Ebraica*, lib. iii. cap. 24.

(*b*) 4 *G.* 4. *c.* 76.

(*c*) By the civil law, divorces, a vinculo matrimonii, were allowed even under Christian emperors; but the canon law, founding itself on the evangelical precept, "What God hath joined let no man put asunder," though it allowed a separation, a mensâ et thoro, in cases of adultery, taught that a marriage, once validly contracted, could be dissolved only by the death of one of the parties. See this matter fully discussed in *Pothier, Traité du Contrat de Mariage*, No. 464. and 486., &c.; and see *Evans* v. *Evans*, 1 *Hagg.* 48. The law of *England* adopts the rule of the canon law in this respect. No divorce a vinculo matrimonii, where the marriage was once valid, can be obtained in *England* except by an act of parliament, — that is, by a new law made, *pro hâc vice*, to suit the particular occasion. It would

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and that, supposing a Jewish divorce to be capable of effecting a dissolution of the marriage, yet, in the absence of the document of divorce, there was no evidence that any divorce had taken place. The learned Judge was of opinion that a divorce had not been established, and gave the defendant leave, in case the plaintiff obtained a verdict, to move to enter a verdict for the defendant on the first issue, if the Court should be of opinion that, since the new rules, coverture in the plaintiff could be given in evidence under the plea of *non assumpsit*.

Talfourd, Serjt. now moved for a new trial. It may be admitted that the plaintiff is not entitled to move for a new trial if the case has been correctly presented to the jury, there having been evidence on both sides as to the cause of the injury to the glass; but the plaintiff considers that she has a right to complain of the mode in which the case was left to the jury. [*Tindal* C. J. Suppose a horse is returned with broken knees, can it be said that he has not been re-delivered?] The broken fragments of the drops of the lustre, which had been shivered to pieces, had ceased to be drops, and the "20 drops of one lustre" have never been re-delivered.

Tindal C. J. I am of opinion that there has been no misdirection in this case. The declaration contains two breaches, one, for not taking care of the articles, and for re-delivering some of them in a damaged state; the other, for not returning certain articles. The particulars of the breaches follow this division, and specify two sets of articles: one, the articles re-delivered in a damaged state, the other, articles not returned at

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therefore appear, that either the law of *England* must be taken to be founded upon an erroneous construction of the precept cited above, or else that a divorce bill, containing permission to both, or to either, of the parties to remarry, whilst both are alive, is a proceeding in direct contravention of a divine command.

all. It would deceive a defendant, if he could be turned round upon in the manner which had been suggested.

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The other Judges concurred.

Rule refused.

Crawshay and Others *v.* Barry.

May 8.

Assumpsit for the price and value of goods sold and delivered by the plaintiffs to the defendant, at his request; and for the price and value of work done, and materials for the same, provided by the plaintiffs for the defendant, at his request; and for money paid by the plaintiffs for the use of the defendant, at his request; and on an account stated.

To a declaration for goods sold and delivered, and work done, and materials provided at the defendant's request, a plea that the goods were sold to the defendant as the agent and broker of *F.* and *M.*, to whom the plaintiff consigned the goods, and that the work and materials were done and provided in and about the shipping and consigning of the goods to *F.* and *M.* is bad, as not shewing that the work and materials were not done and provided on the defendant's credit.

Plea, that the said goods and chattels in the first count mentioned, so alleged to have been sold by the plaintiffs to the defendant, as aforesaid, were certain goods and chattels, to wit, 100 tons of iron, sold by the plaintiffs to the defendant, as the broker and agent in that behalf, to certain persons, to wit, *F.* and *M.* of *New York*, as the principals in the said sale, and to whom they were consigned by the plaintiffs, (they, the plaintiffs, well knowing that the said *F.* and *M.* were such principals, and the parties really contracting in the same, and that the defendant was only the broker and agent in that behalf.) And, further, that the said work and materials were done and provided, and the said money was paid, in and about the shipping and consigning of the said iron to the said *F.* and *M.*; and that the said account was stated, of and respecting the

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same, and not otherwise. And that the defendant, after the debt therein mentioned became due and payable, and before the commencement of the suit, made a certain order upon or direction to the superintendent of the *London* Docks, who then had in his possession divers large quantities of tea, to wit, 200 chests of the defendant's, and, by the said order, the defendant directed the superintendent to deliver the said tea to the plaintiffs or their order on demand, which order the defendant deposited with the plaintiffs, as security for the iron so sold and delivered as aforesaid, with liberty for the plaintiffs to sell such tea on the same being delivered to them in pursuance of the said order. Yet the plaintiffs wrongfully delayed and neglected to make such sale for a long and unreasonable time after they received such order, to wit, ten months, and thereby lost the market for the same. And the said tea was subsequently sold by the plaintiffs at a much lower rate than it would have been, but for the negligence of the plaintiffs; and that if sold in such reasonable time as aforesaid, the plaintiffs would thereby have obtained full satisfaction of the debts and causes of action in the declaration mentioned. Verification.

Replication, *de injuriâ*. Special demurrer, and joinder.

Stephen, Serjt. in support of the demurrer. The question is, whether the plaintiffs can reply *de injuriâ* to this plea. (*a*) It is not contended that the plea is good; it was impeachable at the proper time. In substance, however, and laying aside the part relative to the deposit of the order for the tea as a security, it is a sufficient answer to the declaration. [*Tindal* C. J. The plea does not go to the whole declaration, which states

(*a*) *Vide Jones* v. *Senior*, 4 *M. & W.* 123., 6 *Dowl. P. C.* 701.; *Reynolds* v. *Blackburn*, 7 *Ad. & Ell.* 161., 2 *N. & P.* 136., 6 *D. P. C.* 19.

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that the work was done at the defendant's request. That the defendant does not deny: he says, the goods were sold to him as the agent of other parties, but he does not allege that he acted merely as an agent with respect to the work. It is perfectly consistent with the plea, that the work was done at his request. *Erskine* J. You may make yourself personally liable for work done to another man's goods.] The plea first avers that the goods were sold to the defendant as the agent of parties at *New York*, to whom they were consigned by the plaintiffs; and it then alleges that the work was done in and about the shipping and consigning of the goods: taking it to be true that the work was so done, it could not be done at the defendant's request. The plea consequently amounts to a denial, that the defendant was the party to whom credit was given. [*Tindal* C. J. The plaintiffs might be willing to trust the principals at *New York* up to a certain point, but not further, and might say that they would furnish the goods on their credit, but that with regard to the work they would look to the defendant.] The plea must be construed according to a reasonable intendment; and although it might have been more formally worded, yet its allegations, when fairly understood, mean that the goods were supplied, and the work was done, for the parties at *New York*. In *Regil* v. *Green* (*a*), the plea was not very dissimilar to this; and there the Court, by deciding the replication to be bad, held in effect that the plea was good. So in *Parker* v. *Riley* (*b*), where the plea more nearly resembled the present, it was held good, and the Court ruled, that when a plea to a contract amounts to the general issue, the replication *de injuriâ* is bad. [*Bosanquet* J. But this plea does not amount to the general issue.]

(*a*) 1 *M. & W.* 328. (*b*) 3 *M. & W.* 230.

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TINDAL C. J. In this case the plea is no answer to the count for work done and materials provided. It does give a kind of answer to the first count of the declaration, which amounts to the general issue.

Judgment for the plaintiff.

Butt appeared for the plaintiff.

April 29.

DOE dem. RICHARD BARROW *v.* ROE.

Where the tenant in possession had rendered the premises inaccessible, and had evaded personal service of a declaration in ejectment, service by leaving it at the counting house of the tenant in possession, was held sufficient.

EJECTMENT, brought to recover about 500 square feet of land, on which Messrs. *Gardners*, the tenants in possession, who are brewers, had erected a wing of their brewery. (*a*)

(*a*) For this erection *Barrow* had brought an action of trespass *quare clausum fregit* against the *Gardners*, in which *Barrow* obtained a verdict with nominal damages. The case had been taken as an undefended cause, and the defendants having obtained a rule *nisi* for a new trial on the ground of surprise, that rule was discharged on the plaintiff's "undertaking not to plead or offer in evidence the judgment in that cause, in any other action which might be brought by the plaintiff against the defendants, touching the matters in dispute in that cause." If in any subsequent action judgment had been *pleaded* in violation of this undertaking, the court would, no doubt, have set aside the plea as contrary to good faith. *Payne* v. *Rogers*, 1 *Dougl.* 407.; *Craib* v. *D'Aeth*, 7 *T. R.* 670., 1 *Bos. & P.* 448. *n.*; *Legh* v. *Legh*, *Ib.* 447.; *Barker* v. *Richardson*, 1 *Younge & Jerv.* 362.; *Manning* v. *Cox*, 7 *B. Moore*, 617.; *Innell* v. *Newman*, 4 *B. & Ald.* 419. And see *Pascoe* v. *Pascoe*, 2 *Cox*, 109.; *Herbert* v. *Pigott*, 4 *Tyrwh.* 285., 2 *Crompt. & Mees.* 384.; *Johnson* v. *Holdsworth*, 4 *Dowl. P. C.* 63.; but if the judgment were tendered in evidence upon the trial of any issue to which such judgment was pertinent, it would be no objection to its reception that the party tendering the judgment had given an undertaking not to do so. The only

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Doe dem. Barrow v. Roe.

Wilde, Solicitor-General, moved for a rule to shew cause why the service of the declaration and notice to appear should not be deemed good service under the following circumstances, disclosed in an affidavit made by two clerks of the attorney for the lessor of the plaintiff. The spot in dispute was rendered inaccessible by a wall which Messrs. *Gardners* had built. Several attempts were made to serve the defendants at the counting-house, but the clerk who went to serve the process was always refused an interview, and the defendants ultimately caused him to be removed from their outer counting-house by one of their draymen. On which last occasion, the clerk left the declaration and notice upon the desk of that counting-house.

The Court granted a rule *nisi*, which was afterwards, in the same term, no cause being shewn, made

Absolute. (*a*)

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remedy would be an attachment for the contempt, in acting in breach of the undertaking. So, in cases in which a court of equity has given directions as to the production or non-production of evidence on a trial at law, such directions are binding on the parties (who must obey at their peril), but do not bind the common law court, and have therefore no effect directly upon the proceedings in that court. *Vide post*, 308. (*a*).

(*a*) And see *Anon.* 1 *Chitt. Rep.* 100. (*a*); *Anon.* 1 *Chitt. Rep.* 505. *n.*; *Doe dem. Batson* v. *Roe*, 2 *Chitt. Rep.* 176.; *Anon.* 2 *Chitt. Rep.* 177.; *Anon.* 2 *Chitt. Rep.* 186.; *Doe dem. Pugh* v. *Roe*, 1 *Scott*, 1064., 1 *Hodg.* 6.; *Doe dem. Turncroft* v. *Roe*, 1 *Harr. & W.* 371.; *Doe dem. Visger* v. *Roe*, 2 *Dowl. P. C.* 449.; *Doe dem. Frith* v. *Roe*, 3 *Dowl. P. C.* 569.; *Doe dem. Morpeth* v. *Roe*, *Ibid.* 577.; *Doe dem. Dickens* v. *Roe* 7 *Dowl. P. C.* 121.; *Doe dem. Scott* v. *Roe*, 6 *New Cases*, 207.

May 5.

DUGGAN *v.* WILBRAHAM. (*a*)

Where issue is joined in *Michaelmas* vacation, and no notice of trial is given, the defendant is not entitled to move for judgment as in case of a nonsuit, until *Trinity* term.

GOULBURN, Serjt. having obtained a rule to shew cause why judgment should not be given for the defendant, as in case of a nonsuit,—upon an affidavit, stating that issue had been joined on 6th *December*, and that the plaintiff had not proceeded to trial.

Channell, Serjt. now shewed cause. The motion is made too soon, issue having been joined in this case in *Michaelmas* vacation, not in *Michaelmas* term; nor can it be considered as an issue as of *Michaelmas* term; and no notice of trial having been given, the defendant was bound to wait till *Trinity* term before he moved for judgment as in a case of a nonsuit: *Fox* v. *M'Culloch*. (*b*) There, issue was joined in *Trinity* vacation, and the motion for judgment, as in case of a nonsuit, was in the following *Hilary* term, no notice of trial having been given. That was a town cause. *Robinson* v. *Taylor* (*c*) will probably be relied on by the other side; but that was a country cause; and *Littledale* J., by whom it was decided, expressly abstained from giving an opinion as to what would have been the practice if it had been a town cause. In *Pierson* v. *Chessun* (*d*) it was stated by the Court that the decision in *Fox* v. *M'Culloch* proceeded on the ground that an issue joined in the vacation could not be treated as an issue joined as of the preceding term. [*Tindal* C. J. The plaintiff is entitled to two terms, unless notice of trial has been given.]

(*a*) And see *Smith* v. *Pole*, 5 *Mees. & W.* 491.; *Doe dem. Balls* v. *Margrave*, *post*. 333.

(*b*) 5 *Dowl. P. C.* 526.

(*c*) *Ib.* 518.

(*d*) 6 *Dowl. P. C.* 507.

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Goulburn, Serjt., in support of the rule. *Williams* v. *Edwards* (*a*), in which issue was joined in *Easter* vacation, and the motion for judgment, as in case of a nonsuit, made in *Michaelmas* term, was held to be too early, was a country cause. [*Bosanquet* J. *Gough* v. *White* (*b*), in which it was held that a defendant cannot move for judgment as in case of a nonsuit, until the *third* term after issue joined, was a town cause. In *Heale* v. *Curtis* (*c*), the rule was discharged on the ground that it was not shewn that the cause was a country cause.] The relation back to the preceding term is not taken away. This, therefore, must be considered as an issue joined *as of Michaelmas* vacation *as of Michaelmas term.* [*Erskine* J. In *Harrison* v. *Williams* (*d*), it was held that even in a country cause, where issue is joined, as it is here, in *Michaelmas* vacation, it is too early to move for judgment as in case of a nonsuit in *Easter* term, if no motion of trial has been given.]

TINDAL C. J. This rule must be discharged, the costs to be costs in the cause.

Channel, Serjt. In the Court of Exchequer (*e*), the defendant is always made to pay the costs of an irregular and vexatious motion for judgment as in case of a nonsuit. [*Tindal* C. J. Here, there was considerable doubt. (*g*)]

Rule discharged, the costs to be costs in the cause. (*h*)

(*a*) 3 *Dowl. P. C.* 183.
(*b*) 2 *Mees. & Welsb.* 363.
(*c*) *Ib.* 76.
(*d*) 6 *Dowl. P. C.* 772.
(*e*) Vide *Smith* v. *Miller*, 3 *M. & W.* 60.
(*g*) Vide *Gough* v. *White*, *ubi suprà*; *Doe dem. Balls* v. *Margrave*, *post*, 333.
(*h*) If therefore the plaintiff, through any cause, should be defeated in the action, he would have to pay both his own costs and those of the defendant, occasioned by the experiment which the latter had thought proper to make; whereas, if a defendant fail to establish a point raised, however fairly, *by a plea*, the costs follow the result of the particular inquiry rendered necessary by that plea.

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May 9.

THOMPSON *v.* JACKSON.

A plea of payment of money into court under 3 & 4 *W.* 4. *c.* 42. *s.* 1., and *R. T.* 1 *Vict. reg.* 1., in bar of the *further* maintenance of the action, cannot be pleaded to the same cause of action to which other pleas are pleaded in denial of the existence of that cause of action at the time of action brought.

TRESPASS, for breaking and entering the plaintiff's dwelling-house, and taking and carrying away his goods.

Plea — first, not guilty; secondly, that the dwelling-house in which &c. was not, at the time &c. when &c. the dwelling-house of the plaintiff; thirdly, that the goods were not the goods of the plaintiff; fourthly, leave and licence; fifthly, in bar of the *further* maintenance of the action,—that the defendant now brings into court the sum of —*l.* ready to be paid to the plaintiff, and that the plaintiff has not sustained damages to a greater amount than the said sum of —*l.*, in respect of *the causes of action in the declaration mentioned* (*a*), and this he is ready to verify; wherefore he prays judgment if the plaintiff ought *further to maintain his action.*

Channell, Serjt. having obtained a rule *nisi* to discharge the rule to plead several matters, on the ground that the fifth plea, which admitted that the action had been properly brought, and that up to the time of the delivery of the plea it had been properly continued, and merely prayed that it might be no longer prosecuted, on the ground of satisfaction made to the plaintiff since the commencement of the action, — was inconsistent with pleas which denied that the plaintiff ever had any such right of action against the defendant.

(*a*) *R. E.* 1 *Vict. reg.* 1., (amending *R. H.* 4 *W.* 4. *reg.* 17.); 4 *New Cases*, 814.; 8 *Ad. & Ell.* 278.; 3 *N. & P.* 380.; 4 *M. & W.* 2. And see *Kingham* v. *Robins*, 5 *M. & W.* 94.; *Wright* v. *Goddard*, 8 *Ad. & Ell.* 144.; 3 *N. & P.* 361.; *Baker* v. *Jubber*, *antè*, 212.; *Attwood* v. *Taylor*, *post*, 279.

As to getting the money out of court, in case of an abatement of the action by death, see *Parker* v. *Reiffenstein*, *antè*, 94.

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Stephen, Serjt. now shewed cause. A party who takes such an objection as this, should apply at the very earliest period. That has not been done here. But there is no ground for the objection. This plea is given by a particular statute (*a*), and the form is prescribed by a rule of court founded on that statute. By that statute a boon was intended to be given to defendants. But, if the right to plead payment into court be clogged with the condition, that no other plea shall be pleaded with it, the supposed boon will turn out to be attended with little or no benefit. But the rule of court does not require that this plea shall be pleaded *alone*. [*Tindal* C. J. A tender cannot be pleaded to the whole action, together with other pleas which deny the right of action.] It is true that a tender cannot be pleaded with the general issue to the whole declaration; *Marlellan* v. *Howard* (*b*), *Jenkins* v. *Edwards*. (*c*) Pleas of tender, however, contain a distinct admission of a cause of action to the extent of the sum tendered, which a plea of payment does not. (*d*) It is true that when the

(*a*) 3 & 4 *W.* 4. *c.* 42.

(*b*) 4 *T. R.* 194. The ground upon which the rule to plead double was discharged in that case was this, — "if the general issue be found for the defendant, it will then appear on the record that no debt is due, and yet that the defendant admits that he owes something. But this reason appears to apply to other cases in which inconsistent pleas are allowed to be pleaded together. In trespass *quare clausum fregit*, a defendant pleads not guilty, and a right of way. If the first issue be found for him, the record will shew that the defendant never did break and enter the plaintiff's close, while the same record will shew that the defendant has admitted that he broke and entered the plaintiff's close for the purpose of exercising a right of way. The difficulty of allowing a plea of tender with other pleas denying a right of action, will perhaps be found to lie rather in the form of the judgment than in repugnancy in the verdict.

(*c*) 5 *T. R.* 97. So *non est factum* and tender, *Orgill* v. *Kemshead*, 4 *Taunt.* 459.

(*d*) The effect of a plea of tender and of payment of money into court under a rule of court or a judgment order, has been generally considered to be the same. See *Middleton* v. *Brewer*, *Peake*, *N. P. C.* 15.; *Jenkins* v. *Tucker*, 1 *H. Bla.* 90.; *Gutteridge* v. *Smith*, 2 *H. Bla.* 374.; *Watkins* v. *Tower*,

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courts were first called upon to put a construction upon 4 *Ann. c.* 16., it was considered that the statute was not intended to authorise the pleading of *inconsistent* pleas, such as *non assumpsit* and payment. But it was afterwards considered that the pleading of these two pleas together is tantamount only to saying, "Prove your demand, and I will shew that it has been satisfied." [*Bosanquet* J. It is also material to look at the form of the plea.] There is nothing in the joining of the fifth plea with the other, which tends to prevent the justice of the case being got at. [*Erskine* J. By the rule, the plaintiff, after the delivery of a plea of payment of money into court, is to be at liberty to reply to the same by accepting the sum so paid into court, in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and to tax the costs of suit; and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed. Judgment could not be signed while there was a plea of the general issue on the record, until that issue had been disposed of by a verdict in favour of the plaintiff. *Tindal* C. J. Does not a plea in bar of the *further* maintenance of the action, admit that the action was well commenced? A plea *puis darrein continuance*, inasmuch as it only bars the *further* maintenance of the action, is an abandonment and waiver of all previous pleadings on the part of the defendant.](a) The plea *puis darrein continuance* is pleaded in a subsequent stage of the proceedings to that in which the pleadings, supposed to be waived by the plea *puis*

2 *T. R.* 280.; *Bennett* v. *Francis*, 2 *Bos. & P.* 550.; *Muller* v. *Hartshorn*, 3 *Bos. & P.* 556.; *Yate* v. *Willan*, 2 *East*, 128.; *Clarke* v. *Gray*, 6 *East*, 564.; *Godsall* v. *Boldero*, 9 *East*, 72. 79.; *Cox* v. *Brain*, 3 *Taunt.* 95.; 1 *Wms. Saund.* 33. *e.*

(a) A plea in bar *puis darrein continuance* regularly begins with a *relictâ verificatione* of the former plea: *Reg.* v. *Epise. Lincoln. Bury, et Lingard, Co. Ent.* 518. *a.*; *Barber* v. *Palmer*, 1 *Salk.* 178.; 1 *Ld. Raym.* 693.; 12 *Mod.* 539.

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darrein continuance, were placed upon the record. [*Tindal* C. J. If the costs are taxed under the rule, how is payment to be obtained?]

Channell, in support of the rule. The defendant might have pleaded the payment of money into court by way of compensation or amends for part of the cause of action, and might, without being chargeable with any inconsistency, have pleaded other pleas, denying the plaintiff's cause of action, as to the residue.

TINDAL C. J. The defendant may either confine his plea of payment to part of the cause of action, or withdraw it altogether. The costs of the motion and of the amendment, to be costs in the cause.

Rule absolute, in the form pronounced. (*a*)

(*a*) And see *Corbett* v. *Swinburne*, 8 *Ad. & Ell.* 673.; 3 *N. & P.* 551.; *Roe* v. *Cobham*, 6 *Dowl. P. C.* 628.; *post*, 279.

As to the *application* of a plea of payment, (the rule being the same whether the payment be before or after action brought), see *Mitchell* v. *Townley*, 7 *A. & E.* 164., 2 *N. & P.*, over-ruling *Mee* v. *Tomlinson*, 4 *A. & E.* 262., 5 *N. & M.* 624.; *Jourdain* v. *Johnson*, 2 *C. M. & R.* 564.; *Marshall* v. *Whiteside*, 1 *M. & W.* 188. See also *Taylor* v. *Willes*, *Cro. Car.* 219.; *Swinburne* v. *Ogle*, 1 *Lutw.* 241., second point.

A release of the action, given after declaration, pending an imparlance, though it is only in bar of the further maintenance of the action, may be pleaded as an original plea; *Price* v. *Kendrick*, *Fortesc.* 338.

At common law the owner of cattle taken damage feasant, might, before impounding, tender amends; *Six Carpenters' Case*, 8 *Co. Rep.* 146 *a*; *Anscomb* v. *Shore*, 1 *Campb.* 285.; 1 *Taunt.* 261.; 6 *N. & M.* 610 *n.*; *Com. Dig. Pleader*, (3 K. 23.); and after the tender of sufficient amends they could not be lawfully detained or impounded. The owner, however, remained liable to an action of trespass *quare clausum fregit*, in which he would have no defence. But by 21 *Jac.* 1. *c.* 16. *s.* 5. it is enacted, that "in all actions of trespass *quare clausum fregit* wherein the defendant shall disclaim in his plea to make any title or claim to the land in which &c., and the trespass be, by negligence or involuntary, the defendant shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought; whereupon, or upon some of

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them, the plaintiff shall be enforced to join issue, and if the issues be found for the defendant, or the plaintiff shall be nonsuited, the plaintiff shall be clearly barred from the said action and all other suits concerning the same." This statute did not extend to trespasses by mistake, if the acts were voluntary, *Basely* v. *Clarkson*, 3 *Lev.* 37., or to any trespass for taking goods, *Bailee* v. *Viveash*, 1 *Stra.* 549. In replevin it would not, from the above cases, appear to be necessary to plead that the trespass was *involuntary*. In *Allen* v. *Bayley*, 2 *Lutw.* 1594., however, the plea in bar to the avowry alleged, that the trespass had been committed *involuntariè et contra mentem le distreinee*, *ib.* 1595.

Thus stood the law at the time of the passing of 3 & 4 *W.* 4. *c.* 42. as to parties generally. But in the case of a justice of the peace, it was provided, by 24 *G.* 2. *c.* 44. *s.* 2.,—" that it shall be lawful for such justice, at any time within one calendar month after notice of action given him, as required by that act, to tender amends to the party complaining, or to his agent or attorney, and in case the same is not accepted, to plead such tender in bar to any action to be brought against him, *together with the plea of not guilty, and any other plea*, with the leave of the court; and if, upon issue joined thereon, the jury shall find the amends so tendered to have been sufficient, then they shall give a verdict for the defendant; and in such case, or in case the plaintiff shall become nonsuit or shall discontinue his action, or in case judgment shall be given for such defendant upon demurrer, such justice shall be entitled to the like costs as he would have been entitled unto, in case he had pleaded the general issue only; and if upon issue so joined the jury shall find that no amends were tendered, or that the same were not sufficient, and also against the defendant on such *other plea or pleas*, then they shall give a verdict for the plaintiff, and such damages as they shall think proper, which he shall recover together with his costs of suit."

And by the fourth section it is enacted, " that in case such justice shall neglect to tender any amends, or shall have tendered insufficient amends, before the action brought, it shall be lawful for him, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of money as he shall see fit; whereupon such proceedings, orders, and judgments shall be had, made, and given in and by such court, as in other actions where the defendant is allowed to pay money into court."

It will be seen therefore, that justices of the peace are authorised by 24 *G.* 2. *c.* 44. to plead a tender of amends, *with the plea of not guilty and any other plea.* It is however observable that this statute does not expressly give any power of signing judgment, such as is contained in *R. H.* 4 *W.* 4. *reg.* 19., 3 *N.* & *M.* 7., and in *R. T.* 1 *Vict. reg.* 1., 8 *A.* & *E.* 278.

In an action against two defendants, one may plead in bar of the action generally, the other in bar of its *further* maintenance. In *Ejectione firmæ*, *Nevil's Case*, *Dyer*, 226 *b.*

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ELIJAH GALLOWAY and THOMAS ROUTLEDGE *v.* JOHN BLEADEN, Secretary of the COMMERCIAL Steam Packet Company.

THE declaration stated, that the plaintiff *Galloway* was the inventor of "certain improvements in paddle-wheels for propelling vessels," and that, on the 18th of *August*, 6 *W.* 4., a patent was granted to *Galloway* to make, use, exercise, and vend (*a*) the said invention, to wit, within *England*, *Wales*, and *Berwick-upon-Tweed*, for a term of fourteen years, with a proviso that, if *Galloway* should not particularly describe and ascertain the nature of his invention, and in what manner it was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in Chancery within six calendar months, then the patent should be void. Averment: that *Galloway* did, within six calendar months, to wit on, &c., by an instrument in writing, under his hand and seal, describe and ascertain, &c., and cause the same to be enrolled: and that *Galloway* assigned a moiety of the patent to the plaintiff *Routledge*. Yet the said company, well knowing the premises (*b*), but contriving and wrongfully intending to injure the plaintiffs, and to deprive them of the said invention, made divers paddle-wheels for propelling vessels on the said improved plan or principle, and in imitation of the said invention, and sold and vended (*a*) divers other of the said paddle-wheels, without the leave and against

Where, in a declaration the defendant was described as the secretary of a public company, and a cause of action against the company was set forth, the court, after verdict for the plaintiff, refused to allow an amendment in the declaration by inserting — that the company were trading under letters patent of Her Majesty, empowering them to sue and be sued in the name of one of the two public officers to be appointed by them for that purpose, and that the defendant was one of such officers, duly appointed to sue and be sued for and on behalf of the company, and duly registered as such officer, pursuant to 7 *W.* 4. & 1 *Vict.* *c.* 73., — except upon the terms of the plaintiff's paying the costs of the motion, and of a motion in arrest of judgment, and of foregoing the costs of the trial.

(*a*) See 5 *N.* & *M.* 647. (*b*) *Qu.* Whether a *scienter* necessary.

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the will of the plaintiffs, in breach of the letters patent, and against the privilege so granted to *Galloway*. Second count, that the company, further contriving and intending as aforesaid, made paddles in imitation of the invention. Third count, for counterfeiting, imitating, and resembling the invention in part, and making colourable additions to and subtractions from the same, whereby to pretend the said company to be the inventors thereof, and selling and putting into practice paddle-wheels for propelling vessels made to counterfeit, imitate, and resemble, in part, *Galloway*'s invention, with colourable additions and subtractions. Fourth count, for making paddle-wheels for propelling vessels, with other improvements in the construction thereof, which were intended to imitate and resemble, and did imitate and resemble, the improved paddle-wheels so invented by *Galloway*.

Pleas: first, that *the Company* are not guilty (*a*); secondly, that *Galloway* was not the first and true inventor; thirdly, that the nature of the invention (*b*), and the manner in which it was to be performed (*c*), were not particularly ascertained or described, according to the true intent and meaning of the said letters patent, in or by the instrument of specification mentioned in the declaration; fourthly, that the supposed invention was not a new invention (*d*) or manufacture, within this realm, but had been publicly used (*e*) in *England* by divers other persons. (*g*)

(*a*) As to what shall be an infringement, see *Minter* v. *Williams*, 4 *Ad. & Ell.* 251., 5 *N. & M.* 647.

(*b*) *Godson, Pat.* 2d ed. 108.

(*c*) *Ibid.* 150.

(*d*) See *Hill* v. *Thompson*, 3 *Meriv.* 622., 8 *Taunt.* 375., 2 *B. Moore*, 424., *Holt, N. P. C.* 636.; *Brunton* v. *Hawkes*, 4 *B. & Ald.* 541.; *Minter* v. *Wells*, 5 *Tyrwh.* 163.; *Manton* v. *Manton*, *Davis, Patent Cases*, 333.

(*e*) See *Wood* v. *Zimmer*, *Holt, N. P. C.* 58. 60.; *Lewis* v. *Marling*, 10 *B. & C.* 22., 5 *Mann. & R.* 66., 4 *Carr & P.* 52.; *Cornish* v. *Keene*, 3 *New Cases*, 570., 4 *Scott*, 337., 2 *Hodges*, 281.; *Russell* v. *Cowley*, 1 *Cr. M. & R.* 864.; *Morgan* v. *Seaward*, 2 *M. & W.* 544., 1 *Murph. & H.* 57.; *Minter* v. *Mower*,

With these pleas a notice of objections was delivered, pursuant to 5 & 6 *W.* 4. *c.* 83. (*a*) *s.* 5., which notice was afterwards amended by striking out some objections and altering others.

The replication joined issue upon the first three pleas, and took issue upon the fourth, by asserting that the invention was a new invention or manufacture within this realm, and had not been publicly practised and used by others.

Admissions were made in the cause by the defendant's attorney, in the whole of which the company are mentioned as "the defendants."

At the trial, at *Westminster*, before *Tindal* C. J., which occupied two days, the jury found a verdict for the plaintiffs upon all the issues, with nominal damages. *Campbell* A. G. applied to the Lord Chief Justice to give a certificate under the third section of 5 & 6 *W.* 4. *c.* 83. *s.* 5. (*b*), and also to certify for a special jury. The

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6 *Ad. & Ell.* 735., 1 *N. & P.* 595., 1 *Willm. W. & D.* 263.; *Key* v. *Marshall*, 5 *New Cases*, 492., 1 *Myine & C.* 373.; *Hare* v. *Harford, Godson, Pat.* 2d ed. 39.; *Walker* v. *Congreve*, *ib.* 56.; *Jones* v. *Pearce*, *ib.* 28. 46. 190. In the last case the defendant obtained a rule *nisi* for a new trial; but before the rule came on to be argued, the cause was compromised. *Ex relatione Watkins* and *Hooper*, attorneys for *Pearce*.

(*a*) By which it is enacted, that in any action for infringing letters patent, the defendant, on pleading thereto, shall give the plaintiff a notice of any objections on which he means to rely at the trial; and no objection shall be allowed to be made by the defendant at the trial, unless he prove the objections stated in such notice. Provided always, that it shall be lawful for any judge at chambers to give leave to offer other objections, on such terms as to the judge shall seem fit.

(*b*) That if any action at law, or suit in equity for an account, be brought in respect of any alleged infringement of letters patent, or any *scire facias* to repeal letters patent, and if a verdict pass for the patentee or his assigns, or if a final de-

(*f*) Orders have been obtained in this Court, for the name and addresses of the persons supposed, by the declaration, to have used the invention; *Boulnois* v. *Mackenzie*, 4 *New Cases*, 127., 6 *Dowl. P. C.* 215. So in the Court of Exchequer, *Lord* v. *Hague*, *Godson. Pat.* 2d ed. 239.

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learned Judge reserved the question as to giving a certificate under the statute, but certified for a special jury. (*a*)

In *Hilary* term, *Stephen*, Serjt. obtained a rule calling upon the plaintiffs to shew cause why judgment should not be arrested, for the insufficiency of the declaration, it not being alleged therein that the defendant *Bleaden* was the registered officer of the Company, as required in order to bring the case within 7 *W.* 4. & 1 *Vict. c.* 73. *s.* 3., so as to render him suable for the acts of the Company.

Afterwards, in the same term, *Montague Smith* obtained a rule, calling upon the defendant to shew cause why the *nisi prius* record, &c. should not be amended by inserting therein that the Company were trading under letters patent of Her Majesty, empowering them to sue and be sued in the name of one of the two public officers, to be appointed by them for that purpose, and that the defendant *John Bleaden* was one of such officers duly appointed to sue and be sued for and on behalf of the Company, and duly registered as such officer, pursuant to the statute of 7 *W.* 4. & 1 *Vict.*

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cree or decretal order be made for him or them upon the merits of the suit, it shall be lawful for the judge before whom the action shall be tried to certify on the record, or the judge who shall make such decree or decretal order, to give a certificate, under his hand, that the validity of the patent came in question before him; which record or certificate being given in evidence in any other suit or action touching such patent, if a verdict pass, or a decree or decretal order be made, in favour of such patentee or his assigns, he or they shall receive treble costs in such suit or action, to be taxed at three times the taxed costs, unless the judge making such second or other decree or order, or trying such second or other action, shall certify that he (or they) ought not to have such treble costs.

(*a*) The fees and expenses of a special jury are not to be allowed, unless the judge, immediately *after the verdict*, certify that the cause was proper to be tried by a special jury, 6 *G.* 4. *c.* 50. *s.* 34., but there is no such restriction as to the time of giving a certificate under 5 & 6 *W.* 4. *c.* 83. *s.* 3.

c. 73. (*a*) The latter rule was drawn up on reading the declaration, and certain affidavits, which stated that the action had been defended by the attorney of the Company, and at their expense, and that the cause had been conducted throughout as the Company's cause, and which set out the letters patent granted to the Company, whereby, after reciting that *Charles Bleaden*,

(*a*) Sect. 2. "That it shall be lawful for Her Majesty, &c., by letters patent to be, from time to time, for that purpose, issued under the great seal, &c., to grant to any company, or body of persons, associated together for any trading or other purposes whatsoever, and to the heirs, executors, administrators, and assigns of any such persons, although not incorporated by such letters patent, any privilege or privileges which, according to the rules of the common law, it would be competent to Her Majesty, &c. to grant to any such company or body of persons, in and by any charter of incorporation." Sect. 3. "That in any such letters patent, so to be granted as aforesaid by Her Majesty, &c. to any such company or body of persons so associated together as aforesaid, but not incorporated, it shall be lawful in and by such letters patent, either expressly or by a general or special reference to this act, to provide and declare that all suits and proceedings, — whether at law, in equity, or in bankruptcy or sequestration (as to which *vide* 252 (b) *infrà*), or otherwise howsoever, as well in *Great Britain* and *Ireland* as in the colonies and dependencies thereof, by or on behalf of such company or body, or any person or persons, as trustee or trustees for such company or body, against any person or persons, whether bodies politic or others, and whether members or not of such company or body, — shall be commenced and prosecuted in the name of one of the two officers, for the time being, to be appointed to sue and be sued on behalf of such company or body, and registered in pursuance of the directions for such appointment and registration respectively hereinafter (sections 6. 16, 17.) contained; and that all suits and proceedings at law or in equity, by or on behalf of any person or persons, whether bodies politic or others, and whether or not members of such company or body, against such company or body, shall be commenced and prosecuted against one of such officers, or if there shall be no such officer for the time being, then against any member of such company or body: provided, nevertheless, that nothing in this act, or in such letters patent, contained, shall prevent the plaintiff from joining any member of such company or body, with such officer, as a defendant in equity, for the purpose of discovery, or in case of fraud."

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the chairman, and the defendant *John Bleaden*, the secretary of the Company, were appointed the officers to sue and to be sued on behalf of the company, and that when these persons should cease to fill those offices, then the chairman and secretary of the Company for the time being were appointed to be sued as aforesaid, Her Majesty, in exercise of the power vested in Her by virtue of 7 *W.* 4. & 1 *Vict. c.* 73. (*a*), willed, granted, and ordained that all suits and proceedings at law, in equity, in bankruptcy, in sequestration (*b*), or otherwise howsoever, as well in *Great Britain* and *Ireland* as in Her colonies and the dependencies thereof, by or on behalf of the partnership as aforesaid, called the Commercial Steam Packet Company, or any person or persons as trustee or trustees for such Company, against any person or persons, whether bodies politic or other, and whether members or not of the said Company, shall at all times, after the return which, after the grant of the letters patent, the said Company is required to make, in pursuance of the said act, shall have been made, be commenced and prosecuted in the name of either of them the said *C. B.* and *J. B.*, or in the name of the other chairman or secretary of the Company for the time being, who shall be registered in pursuance of the provisions of the act, and that all suits and proceedings, at law or in equity, by, or on behalf of, any person or persons, whether bodies politic or others, and whether or not members of the Company, against the Company, shall, at all times after such return shall have been made as aforesaid, be commenced and prosecuted against the chairman or secretary for the time being, to be registered as afore-

(*a*) See the last note.

(*b*) In *Scotland*, where a trader becomes bankrupt, his property and effects may be attached and distributed among his creditors, by a process called mercantile sequestration, which proceeding is now regulated by 54 *G.* 3. *c.* 137. *s.* 15., &c. Hence, a *Scotch* bankruptcy is frequently called, *ab effectu*, a sequestration.

said, and if there shall be no such officer for the time being, then against any member of the Company. The affidavits also stated an application at the Enrolment Office for an extract from the register kept there in pursuance of 7 *W.* 4. & 1 *Vict.* c. 73. *s.*17. (*a*), of the registration of the defendant, *J. Bleaden*, as one of the officers to be sued. This extract the deponent was not allowed to take; and he was informed that it would be necessary to take a copy of the whole register relating to the Company, amounting to more than 400 common law folios (*b*); but he was allowed to see the register, and also the original roll, by which he was enabled to state that the two *Bleadens* were the parties to sue and be sued. Against the latter rule

Stephen, Serjt. now shewed cause. There is nothing at present on the record to shew that the defendant is personally liable for wrongs done by the Company. The declaration mentioned charges that the Company has infringed the plaintiff's patent. But upon a judgment founded upon this record, the goods and lands of *J. Bleaden* will be subject to be taken in execution, whereas, if the course pointed out by 7 *W.* 4. & 1 *Vict.* c. 73. *s.* 3. had been pursued, the judgment would, by the twenty-fourth section (*c*), be against the Company.

(*a*) Which directs that the returns in that act directed to be made to the Enrolment Office of the Court of Chancery in *England*, shall be registered by the clerks of Enrolments in Chancery, or their deputy, in books kept for that purpose; and that an alphabetical index shall be kept of the names of such companies or bodies with reference to such returns; and that any person shall be at liberty to inspect such books and index, and that there shall be paid for such inspection a fee of 1*s.* and no more; and that any person shall be at liberty to require a copy of any such return, to be certified by the said clerks or their deputy, and that there shall be paid for such certificate a fee of 1*s.* 6*d.* for each folio of such copy, and no more.

(*b*) 400 folios would be 22,800 words.

(*c*) That all judgments, de-

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This is a fatal objection, though, as it was admitted on moving for a rule to arrest the judgment, the objection is a formal one; but a party is not to be relieved from an objection, merely because it is a formal one, where the consequences of the amendment will be prejudicial to the opposite party. The proposed amendment would give an entirely new constitution to this suit. [*Tindal* C. J. The amendment could be made with the consent of the company.] If the amendment were granted, it could only be upon the terms of giving liberty to the defendant to traverse the allegations introduced, and a new trial.

M. Smith, in support of the rule. The company are shewn to have been throughout the real defendants, and the amendment prayed will merely put the parties in the situation in which they have always considered

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crees, &c. obtained in any such actions, suits, or other proceedings, as aforesaid, against such officer or member in manner aforesaid,—whether such member or officer respectively be party to such actions, suits, or proceedings, as plaintiff, pursuer, petitioner, or defendant or defender, — shall have the same effect against the property and effects of such company or body, and also (to the extent hereinafter mentioned) against the persons, property, and effects of the individual existing, or former, members thereof respectively, as if such judgments, decrees, &c. had been obtained against such company or body, in suits or proceedings to which all the persons liable, as existing, or former, members of such company or body, had been parties; and that execution, &c. shall be issued accordingly. The section then provides, that where the return per share of the liability of the individual is limited by letters patent, no execution shall be issued against any such individual existing and former members for a greater sum than the residue of the amount for which, by virtue of such letters patent, such individual member should be liable in respect of shares then as theretofore held by him, after deducting the amount advanced and paid in respect of such shares by himself as previous or subsequent holder of the same shares, or their representatives under any former execution, and not repaid at the time of issuing the subsequent execution.

themselves. This is a sufficient ground for permitting the amendment. Thus, in *Sayer* v. *Pocock* (*a*), Lord *Mansfield* said, "By amending, the court only make that right, which the said plaintiff himself understood to be so by his going down to trial." There the defendant had obtained a rule *nisi* to arrest the judgment, on the ground that no issue was joined, no *similiter* having been added. The rule to amend by adding the *similiter*, was made absolute, and the rule for arresting the judgment was discharged. The particular ground for allowing the amendment mentioned by Lord *Mansfield* in *Sayer* v. *Pocock*, was expressly cited and recognised by Lord *Ellenborough* in *Wright, qui tam* v. *Horton* (*b*), in which a similar amendment was allowed in a penal action, after a motion in arrest of judgment. In *Doe dem. Mears* v. *Dolman* (*c*) an amendment was allowed after verdict, for the purpose of avoiding the Statute of Limitations [*Tindal* C. J. In the cases cited, the amendments were in matters of form. Here you seek to introduce three new allegations into the declaration.] The defendant might have demurred to the declaration; the plaintiffs would then have perceived the informality, and would have amended at a trifling expense. (*d*) [*Bosanquet* J. That observation would apply to all motions in arrest of judgment.] The defendant might have demurred, or have traversed that he was secretary, which traverse would have raised the same points as are contained in the allegations now sought to be introduced. In *Cook* v. *Barker* (*e*) there was a plea of payment, to which there was no replication, but as there was also a plea of *nil*

(*a*) 1 *Cowp.* 407.; *S. P. Harvey* v. *Peake*, 3 *Burr.* 1793.; *Grundy* v. *Mell*, 1 *N. R.* 28.; *Sed vide Griffith* v. *Crockford*, 3 *Brod. & B.* 1., 2 *Wms. Saund.* 319. *n.*

(*b*) 6 *Mau. & Selw.* 50.

(*c*) 7 *T. R.* 618.

(*d*) If the declaration contain defects not cured by verdict, the court is bound to arrest the judgment, although the objection might have been taken upon demurrer. But this practice is discouraged by the courts.

(*e*) 5 *Taunt.* 164.

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debet which was found for the plaintiff, upon which the question of payment must have been tried, the court ordered the amendment, upon payment of the costs of the rule, and of a motion which had been made for arresting the judgment. [*Coltman* J. Would a traverse taken upon the allegation that the defendant was secretary have raised the question, whether the company were trading under the letters patent empowering them to sue and be sued in the name of their secretary?] It would have been sufficient, after verdict, to have merely added the words "by virtue of 7 *W.* 4. & 1 *Vict. c.* 73.," after the statement that he was sued as secretary of the company. In *Smith* v. *Fuller* (*a*), in trover against fifteen defendants, the conversion was only charged against fourteen. After error brought, the court allowed an amendment upon payment of costs, though it was objected that the jury could not find a man guilty of a conversion who was charged with a finding only. [*Tindal* C. J. There was a conversion by necessary intendment in that case. Here the defendant did not come down to try these allegations, neither of which was on the record.] In *Tite* v. *Episcopum Worcester* (*b*), the court allowed the *nisi prius* roll to be amended after verdict, without payment of costs. It is a great object with the plaintiffs to obtain a certificate from the learned Judge, that the validity of the patent came in question. [*Bosanquet* J. To bind strangers. (*c*)]

After some further discussion the court refused to permit the amendment, except upon the terms of the plaintiffs consenting to pay the costs of the rule for arresting the judgment, and of this rule, and consenting to forego the costs of the action.

Rule absolute accordingly. (*d*)

(*a*) 1 *Lord Raym.* 116.
(*b*) *Ib.* 94.; 1 *Salk.* 48.
(*c*) *Vide antè*, 249. (*a*).
(*d*) And see *Parker* v. *Curson*, *Cro. Jac.* 529, 530. *S. C.* not *S. P.* 2 *Roll. Rep.* 90.

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CAVE *v.* MOUNTAIN.

TRESPASS, for assaulting and imprisoning the plaintiff. Plea, not guilty. (*a*)

A magistrate who commits a party in a case where he has no jurisdiction, is liable to an action of trespass; but where, supposing the facts alleged to be true, the magistrate has jurisdiction, his liability to be sued, or his exemption from such liability on the ground of jurisdiction, cannot be affected by the truth or falsehood of those facts, or by the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them.

An information brought before a magistrate, which charges an offence within his cognizance, is sufficient to give the magistrate jurisdiction, and to protect him in an action for false imprisonment, although the information disclose no legal evidence against the alleged offenders, and even although it purport to be founded upon inadmissible hearsay evidence.

In a case where the period for which a party has been committed for further examination appeared to the court to be too long, yet the jurors having, to the satisfaction of the Judge at *Nisi Prius*, found that the detention was not excessive, a rule *nisi* for a new trial was refused.

Held, that knowledge on the part of the committing magistrate, that the prisoner will be subjected to restrictions unnecessarily severe, in the gaol to which the commitment is made, does not make the magistrate a trespasser, unless he expressly *direct* such treatment to be adopted in the particular case.

At the trial at the last *Hertford* assizes, before Lord *Abinger* C. B., the following facts appeared.

On *Tuesday*, the 5th of *February* 1839, the plaintiff was taken into custody (*b*) by *Farredge* and *Pannell*, two

(*a*) Under 7 *Jac.* 1. *c.* 5. *s.* 1. And see *Daubney* v. *Cooper*, 5 *Mann. & R.* 314. 10 *B. & C.* 237. The power enjoyed by justices of the peace, &c., of giving special matter in evidence under the plea of the general issue, is not taken away by the new rules of pleading, *H.* 4 *W.* 4., the statute 3 & 4 *W.* 4. *c.* 42. having expressly reserved such rights. But, by *R. T.* 1 *Vict.*, unless the defendant insert in the margin of such plea the words "By statute," such plea is to be taken not to have been pleaded by virtue of any act of parliament, 4 *New Cases*, 816., 8 *A. & E.* 279.

(*b*) By 7 & 8 *G.* 4. *c.* 30. *s.* 28., "for the more effectual apprehension of all offenders against this act," it is enacted, "That any person *found committing* any offence against this act, whether the same be punishable by an indictment, or upon summary conviction, may be immediately apprehended, without a warrant, by any *peace-officer*, or the owner of the property injured, *or his ser-*

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police-officers, by the direction and in the presence of *Wilson*, who was gardener to a clergyman of the name of *Butt*, upon a charge of having feloniously cut down trees in Mr. *Butt*'s garden. (*a*) The plaintiff was handcuffed and shut up in the parish cage. Upon his being brought the next morning before the defendant (also a clergyman) as a magistrate for the county of *Herts*, *Wilson* stated, as a complainant (*b*), and deposed as a

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vant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law." Here the plaintiff was apprehended by peace-officers and the servant of the owner. It was not, however, even alleged that he was *found committing* any offence. But though the original apprehension appears to have been illegal, yet it was immaterial, as to the jurisdiction of the magistrate before whom he was brought, whether the party appeared before him voluntarily or by compulsion, and, if the latter, whether the compulsion was legal or illegal.

(*a*) By 7 & 8 *G.* 4. *c.* 30. *s.* 19., if any person shall wilfully and maliciously cut, break, bark, root up, or otherwise destroy or damage, the whole, or any part, of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, *garden*, orchard, or avenue, or in any ground adjoining, or belonging to, any dwelling house, every such offender, in case the amount of the injury done *shall exceed the sum of one pound*, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment. The same section contains a similar provision in respect of the destroying or damaging of trees, &c. growing elsewhere than in any of the situations thereinbefore mentioned, where the amount of the injury done shall exceed the sum of five pounds.

(*b*) If *Wilson* had *charged Cave*, upon oath, with damaging trees in a garden, *alleging that the amount of injury done exceeded the sum of one pound*, the magistrate would have had jurisdiction, however false the allegation had been, and, indeed, whether any evidence had been given in support of the charge or not. The jurisdiction would have attached, — the magistrate would have become *seised* of the cause, — from the moment at which a *charge* of an offence, in its nature cognizable by a justice of the peace, had been made before him upon oath. The difficulty

witness, that twenty young trees, chiefly poplars and firs, had recently been cut down in Mr. *Butt*'s garden, and that he had heard a boy, whom he named, say that he, the boy, had heard the plaintiff say that he, the plaintiff, had cut down some of Mr. *Butt*'s trees. Upon this statement the defendant signed a warrant, dated the 6th of *February*, committing the plaintiff to the custody of the keeper of the *Berkhampstead* House of Correction, "on strong suspicion of having feloniously cut timber trees, the property of the Rev. Mr. *Butt*," for further examination on *Wednesday*, 13th of *February*, on which day a magistrates' meeting was to take place. Under

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seems to be, to discover that *Wilson*, the informer, *did*, at any time, bring forward any information, or charge, written or verbal, made with oath or without, of that which *purported* to be an offence, cognisable by the defendant, under this statute of 9 G. 4. c. 31. If the information or charge were silent as to the pecuniary amount of the injury, it would rather seem that the magistrate had no more jurisdiction than he would have been entitled to exercise if *Wilson* had, in the most formal manner, alleged in his information or charge, that the amount of the injury done did not exceed five shillings. If, as was probably the case, the whole charge and evidence were mixed up together, and no distinct information was laid or charge preferred, this would not mend the matter, if, in the entire *mixture*, no charge of a cognisable offence could be discovered. It is not distinctly to be collected, from the statements in the principal case, whether the information charged *Cave* with having "feloniously" cut down the clergyman's trees. It is conceived, however, that the bare coupling of the word *felonicè* with an act, amounting at common law to a civil trespass only, and which, under the statute, continues to preserve that quality until the career of destruction has advanced beyond the last penny of the twentieth shilling, will not dispense with a statement, by way of positive charge, of those circumstances which are necessary to stamp the transaction with a felonious character. Could it be said, that jurisdiction would be given, by an information, simply alleging that *B.* "feloniously" caused *A.* to receive into his body the contents of a certain flask, without suggesting what those contents were, and leaving it, but for the word "feloniously," as matter of even and indifferent conjecture, whether the body of *A.* had been made the recipient of wholesome physic, or of deadly poison?

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this warrant the plaintiff was taken to the House of Correction at *Berkhampstead*, where he remained until the 13th in solitary confinement, with no food beyond bread and water, agreeably to the prison regulations, of which regulations the defendant, being a visiting magistrate, was conusant. On the 13th of *February* the plaintiff was brought before the bench of magistrates, when the boy, who, though near at hand, had not been examined on the 6th, was called. The boy having negatived *Wilson's* statement, as to what the former was supposed to have said, the plaintiff was discharged. At the trial it was proved that trees belonging to Mr. *Butt* had in fact been cut down by somebody, and that the extent of the damage done to the trees amounted to *about* 1*l.* Lord *Abinger* C. B. told the jury, that he thought the defendant was justified, upon the statement made before him by *Wilson*, in making out the warrant for committing the plaintiff to the House of Correction; that it was for the jury to say, whether the period for which he was committed was or was not excessive; and that, unless they considered the period during which he was detained in custody excessive, the defendant was entitled to their verdict. The jury, which was, special (*a*), found a verdict for the defendant.

Platt now moved for a new trial, on the ground of misdirection. First, the defendant acted without jurisdiction. Jurisdiction is given by the statute of 7 & 8 *G.* 4. *c.* 30. *s.* 19. (*b*) only where the injury done exceeds 1*l.*: here no evidence was laid before the defendant, as committing magistrate, what the amount of injury was; nor, secondly, had he evidence before him of any act done by the plaintiff at all. [*Tindal* C. J. That would rather shew that there had been an unjust decision, but what you are to make out is, want of jurisdiction.] Unless

(*a*) "—— *veniam petimusque damusque vicissim.*"

(*b*) *Vide suprà*, 258. (*b*).

the injury amounted to the prescribed value, there would be no felony. Thirdly, although where evidence calculated to excite suspicion is laid before the magistrate, he may commit for further examination, the commitment here was for an unreasonable time: *Davis* v. *Capper* (*a*); and, according to *Scavage* v. *Tateham* (*b*), cited with approbation in the judgment in *Davis* v. *Capper*, the law presumes three days to be sufficient. The defendant refused to take bail for the plaintiff's appearance (*c*); he should therefore have committed him until the next day. [*Tindal* C. J. That was left to the jury.]

TINDAL C. J. Before we determine whether a rule should go upon the first point, we should like to consult the learned Judge.

TINDAL C. J. now delivered the judgment of the court.

A motion to set aside the verdict for the defendant, and for a new trial, has been made upon three grounds: first, that the defendant, a justice of the peace, had committed the plaintiff to prison for further examination, in a case brought before him where he had no jurisdiction; secondly, that he had proceeded in the investigation without any information on oath, or any legal evidence of the fact; and, lastly, that the commitment was for an unreasonable time, and therefore altogether void.

As to the first objection, there can be no doubt but that if a magistrate commit a party charged before him, in a case where he has no jurisdiction, he is liable to an

(*a*) 10 *B. & C.* 28., 5 *Mann. & R.* 53.; and see *Rex* v. *Goring*, 2 *Chitty's Burn*, 100. n.; *Tate* v. *Chambers*, 3 *N. & M.* 523.; *Wedge* v. *Berkeley*, 6 *Ad. & Ell.* 663., 1 *N. & P.* 665.; *Wilkins* v. *Hemsworth*, 7 *Ad. & Ell.* 807., 3 *N. & P.* 55.; *West* v. *Smallwood*, 3 *M. & W.* 418.; *Edwards* v. *Ferris*, 7 *Carr. & P.* 542.

(*b*) *Cro. El.* 829.

(*c*) *One* justice cannot take bail upon a charge of felony, 7 *G.* 4. *c.* 64. *s.* 1.

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action of trespass. But if the charge be of an over which, if the offence charged be true in f magistrate has jurisdiction, the magistrate's juri cannot be made to depend upon the truth or fal of the facts, or upon the evidence being suffic insufficient to establish the *corpus delicti* brought investigation. In this case it appears, from the the learned Judge who tried the cause, that the was brought before the defendant, charged with committed a felony, which felony consisted, as from the same notes, and from the information him, in having unlawfully cut down twenty youn the property of the informant's master. It doubtedly true, that no evidence was given, before the magistrate or at the trial, that the of the injury exceeded the sum of 1*l.*, short of value the offence does not amount to a felony 7 & 8 *G.* 4. *c.* 30., the evidence given at the tri no more than this, that the trees cut were worth 1*l.* altogether. But the charge before the ma *was a charge of felony;* and, even if upon a furt vestigation, the amount of the injury had turned be below the value requisite to constitute the that would not have affected the jurisdiction magistrate to investigate the offence, which juri can never be held to depend upon the weight evidence as to the value, though the guilt or in of the prisoner at the trial would undoubtedly Indeed, on the present occasion, no objection v to the judge at the trial as to the want of juris which objection, if made, might have called for e on the other side to shew the value of the trees that, at all events, it comes now too late.

As to the second ground of objection, it is an in part, by the fact that there was *a regular info*

(*a*) *Qu.* if relevant to the sufficiency of the *informa*

on oath laid before the magistrate, the original information having been brought us at the request of both parties. That the information does not disclose any *legal* evidence of the guilt of the prisoner is undoubtedly true; it states nothing beyond mere hearsay, upon which neither judges or juries could act. But, at the utmost, this amounts to no more than an error in judgment on the part of the magistrate; and no case can be found in which a magistrate, acting within his jurisdiction, has been held liable in an action of trespass for a mere error in judgment; see 1 *East*, 563. n. (*a*). It would be a very different case if the defendant had acted from any malicious or improper motive, or with any want of *bona fides*; in which case he would be liable, in a different form of action. (*b*)

As to the last objection, that the commitment for re-examination was for an unreasonable time, and was therefore altogether void, and the magistrate a trespasser, this is in effect an objection as for a verdict against evidence; for the point was left to the jury, on the authority of the case of *Davis* v. *Capper* (*c*), and the jury found for the defendant; and the learned judge who tried the cause, has stated that, under all the circumstances, he is satisfied with the verdict. Although, therefore, the length of time that occurred before the second examination of the prisoner does certainly appear to us to be long, we should be acting at variance with the established course of proceeding in the courts

(*a*) Citing *Drewe* v. *Coulton*, which was an action *on the case* against a returning officer, for refusing the vote of a burgage tenant at *Saltash*, tried before *Wilson* J. at the *Launceston* assizes 1787, where, in the course of the argument, that learned judge said, "If a justice of the peace commit any error *within his jurisdiction*, I know of no case where such an action will lie against him."

(*b*) *Vide Whitelegge* v. *Richards*, 3 *Brod. & B.* 188.; 2 *B. & C.* 45.; 3 *D. & R.* 237.; *Com. Dig. Action on the Case* (A. 6.).

(*c*) *Suprà*, 261.

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at *Westminster*, if we sent the case, under these circumstances, to a new trial.

Platt called the attention of the court to the severe restrictions to which the plaintiff had been subjected during his imprisonment; the defendant, as one of the visiting magistrates, being aware of the harshness of those restrictions, at the time he committed the plaintiff. To which it was answered, by *Tindal* C. J., that, as the defendant had given no express direction on the subject, that made no difference.

Rule refused. (*a*)

(*a*) In *Mills* v. *Collett*, 6 *Bingh.* 85.; 3 *Moor. & P.* 242. this court held that a magistrate was not liable to an action of trespass for committing a party to prison upon a charge of felony, under 7 & 8 *G.* 4. *c.* 30. *s.* 19. for cutting down a tree, although it appeared upon the face of the *depositions* under which the party was committed, that such party was the occupier of the land on which the tree grew. In that case, however, the *information* charged the party with having committed a felony within the terms of the statute, viz. "as having wilfully and maliciously cut, broken, barked, rooted up, or otherwise destroyed, a timber tree growing in a yard belonging to a dwelling-house, *of the value of one pound and upwards*, the property of Dr. *B.*," and was silent as to the occupation of the land, which was disclosed by the depositions. The magistrate, therefore, clearly had jurisdiction, though he may not have exercised that jurisdiction very wisely, in committing a party to prison, (where he was confined three months among felons), upon a charge negatived by the evidence adduced for the purpose of supporting it, and which evidence was before him at the time he signed the warrant of commitment.

The difference between the case of *Mills* v. *Collett*, and the principal case (*Cave* v. *Mountain*) seems to be this, that in the principal case, it no where distinctly appears that the *information*, or *charge*, laid, or made, by the informant, *Wilson*, contained the statement which was to give the defendant, *Mountain*, jurisdiction, namely, *that the amount of injury done exceeded the sum of one pound.*

And see *Lowther* v. *Earl of Radnor*, 8 *East*, 113.; *Pike* v. *Carter*, 3 *Bingh.* 78., 10 *B. Moore*, 376.; *Fawcett* v. *Foulis*, 7 *B. & C.* 394., 1 *M. & R.* 102.; *Ashcroft* v. *Bourne*, 3 *B. & Adol.* 684.; *Coster* v. *Wilson*, 3 *M. & W.* 411.; *Regina* v. *Dodson*, 9 *Ad. & Ell.* 704.; *suprà*, 65. *n.*

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May 5.

ASSUMPSIT. The declaration stated, that the plaintiff, 4th of *June* 1839, recovered against Sir *Henry Wyatt* in Q. B. a debt of 600*l.*, with 70*s.* damages; that on the same day, a *fieri facias* issued into *Middlesex*, which was indorsed, to levy 453*l.* 10*s.* besides, &c., that the writ was delivered to the sheriff, who on the same day took in execution, in a certain house of Sir *H. Wyatt*, situate, &c. goods and chattels of Sir *H. Wyatt* of the value of 500*l.*; that whilst the goods were in the sheriff's possession, the now defendants, *Pyne* and *Richards* (*a*) in consideration that the plaintiff would, at the request (*b*) of the now defendants, authorise the

An order cannot be made for staying proceedings on payment of debt and costs, in an action for unliquidated damages.

Nor, in an action to recover a sum due from a third person, with the costs of certain proceedings against that third person, the payment of which the defendant has guaranteed, per *Erskine* J.

A plaintiff, who in one stage of an action for unliquidated damages, refuses to accept from the defendant, in satisfaction of the suit, a sum which he afterwards takes, is not entitled to the costs incurred after the refusal.

Where on the execution of a writ of inquiry, the parties agree to withdraw the case from the jury, and to submit it to the Master under a Judge's order, the Master sits as an arbitrator appointed by the parties, and the court will not interfere with his finding as to the facts.

(*a*) The letter containing the guarantee, though expressed in the singular number, was signed, by the Defendant, *Pyne*, in the name of the firm of *Pyne* and *Richards*.

(*b*) The words of the undertaking, as set out in the affidavit, were, "Upon your withdrawing from the possession of the goods in the defendant's house in *Lower Grosvenor Street*, at my request, and upon payment of 200*l.*, I hereby undertake," &c. The declaration mentions the payment of the 200*l.* This, which was an act to be done by the defendants (the guarantee being in the name of the firm), formed no part of the consideration, otherwise than as it may be considered as qualifying the act which was to be done by the plaintiff.

The consideration being executory, the statement of the request in the declaration, though mentioned in the undertaking,

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sheriff to withdraw from possession of the goods, taken in execution, — then promised the plain the said goods, &c. should be forthwith removed

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appears to have been unnecessary. In *Osborne* v. *Rogers*, 1 *Wms. Saund.* 264., the consideration of a promise is laid to be that the said *Robert, at the special instance and request* of the said *William*, would serve the said *William*, and bestow his care and labour in and about the business of the said *William*; and the declaration alleges that *Robert*, confiding in the said promise of *William*, afterwards went into the service of *William*, and bestowed his care and labour in and about, &c. Here, the consideration is clearly executory; yet Mr. Serjt. *Williams*, in a note to the words "at the special instance and request," says, "These words are necessary to be laid in the declaration in order to support the action. It is held that a consideration executed and past, — as, *in the present case*, the service performed by the plaintiff for the testator in his lifetime, for several years then past, — is not sufficient to maintain an *assumpsit*, unless it was moved by a precedent request, and so laid."

This note is written evidently under an impression that the promise in *Osborne* v. *Rogers* was stated to have been made *after* the service had been performed; but as that was not the case, and as the note is appended to an allegation of a request accompanying an executory consideration, this note has probably been considered as an authority for the ne averring a request in th an executory considera it has been the comm tice to state a request nexion with an execu sideration, even whe was not, as in the case (*Fisher* v. *Pyne*), dence of an actual requ

The mistake as to of the case of *Osborne* v into which the learne of the note to 1 *Wm* 264., appears to hav may have arisen from cumstance of the dec containing an induce which a *bygone* service *other* master is spoken service, however, ha thing to do with the *ation-service* under th which, at the time of mise, was altogether pr

The statement, acc modern practice, of crual of a debt for, or ing of a promise for ment of, the price of g and delivered, or for payment of money being in consideration sold and delivered, o lent to the defendan *request*, is conceived inartificial mode of de

Even where the cons is entirely past, it a be unnecessary to alle quest, if the act, state consideration, cannot, nature, have been a g kindness, but imports

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Town's sale-room in *Conduit Street*, for the purpose of being sold by auction; and that out of the produce of the sale, the plaintiff should pay 68*l.* with whatever interest the plaintiff might be entitled to under his said judgment and execution; and also any expenses which the plaintiff might have been or might be necessarily put to since the execution. Averment: that the plaintiff confiding in the promise of the now defendants did afterwards, to wit, &c., authorise the sheriff to withdraw from the possession of the said goods, &c.; that the interest to which the plaintiff was entitled, under his said judgment and execution, amounted to 10*l.*; and that the expenses which the plaintiff had necessarily been put to in consequence of the said execution, amounted to 55*l.* 12*s.*, of all which the now defendants then had notice; and although the defendants in part performance of their promise did, afterwards, to wit, 1st of *July* 1839, remove the said goods to the said Mr. *Town's* sale-room, in &c., for the purpose of being sold by auction, and procure the same to be sold by auction; and although the produce of the said sale amounted to a large sum of money, to wit 350*l.*, being a sum much exceeding the said sum of 68*l.*, with all interest to which the plaintiff was or is entitled under his said judgment and execution, and also the amount of the expenses which the plaintiff had necessarily been put to since the said execution; yet the defendants have not paid to the plaintiff, out of the proceeds of the sale, the said sum of 68*l.*, with all interest to which the plaintiff was and is entitled under his said judgment and execution; and also the

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deration *per se*. It being immaterial to the right of action, whether the bargain, if actually concluded and executed, or the loan, if made and the moneys actually advanced, was proposed and urged by the buyer or by the seller, by the borrower or by the lender. Vide *Rastall's Entries*, tit. *Dette*, and *Co. Ent.* tit. *Debt*.

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expenses to which he had been necessarily put since th said execution or any part thereof.

This declaration was prepared on the 4th of *Octobe* 1839, but at the request of the defendants it was no then delivered. On the 31st of *October*, the declaratio not being then delivered, the defendants took out a sum mons calling upon the plaintiff to shew cause why, upo payment of 68*l.* and costs, and also any interest tha might be found by the Master to be due on the judg ment, and any expenses which should be found by hi to have been necessarily incurred by the plaintiff in r spect of his having levied execution in an action, *Fish* v. *Wyatt*, Knt., all further proceedings therein shou not be stayed.

The summons being attended before *Erskine* J. was objected on the part of the plaintiff, that this bein a special action for the payment of unliquidated damages, the defendants were not entitled to have the proceedings stayed by a judge's order, but ought to pay money into court; it was also objected that the plaintiff was entitled to receive, under the defendants' undertaking, more than was offered to be done by the summons. Upon one or both of these grounds the learned judge dismissed the summons.

On 4th *November* the declaration was delivered. On 6th *November* an order for particulars was made, which particulars were delivered on the 11th. On 12th *November* a summons for time to plead was taken out, upon which an order was made. On the same day another summons was taken out and served by the defendants, calling upon the plaintiff to shew cause why, upon payment of 68*l.*, and such interest as the Master should, upon reference, find to be due to the plaintiff, and also any costs or charges which the Master should find that the plaintiff had properly incurred under the said execution, all proceedings should not be stayed;

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and why the plaintiff should not be deprived of costs of his declaration, and all subsequent proceedings in this cause. This summons being attended before *Erskine* J., it was objected on the part of the plaintiff that he was entitled to the costs of the declaration, the same having been ready for delivery on the 24th of *October*, and also that the costs which the plaintiff was liable to pay to his attorney incurred in the cause of *Fisher* v. *Wyatt*, could not be referred to the Master for taxation by an order made in *Fisher* v. *Pyne* and Another; and also that no order to stay proceedings could be made in an action brought to recover unliquidated damages for the breach of a contract of guarantee. This summons was also dismissed.

The defendants, on the 22d *November*, suffered judgment by default, and notice was given of the execution of a writ of inquiry. Before the case was called on, it was arranged between the respective counsel, that instead of the inquiry proceeding before the jury, the matter should be referred to the Master, upon terms which were embodied in a judge's order, of which, with the *allocatur* thereon, the following is a copy: —

Fisher v. *Pyne and Another.* } With the consent of the defendants' attorney, I do order, that on payment of 68*l.* and such interest and expenses as the Master shall find that the plaintiff is entitled to, as necessarily incurred by him since the execution levied in the house of Sir *H. Wyatt*, under the guarantee of the defendant, *W. Pyne* (*a*), dated the 17th of *June* last, within four days after such finding, all further proceedings be stayed. And I also order that, in default thereof, the plaintiff be at liberty to sign final judgment for the amount, and costs of suit, to be taxed.

Dated, the 5th day of *December*, 1839.

T. ERSKINE.

(*a*) *Vide suprà*, 265 (*a*).

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I appoint 12th *December*, at eleven.

Ray.

January 14th, 1840.

Allowed by order - - -	£68	0	0
Interest - - - -	3	16	0
Expenses - - - -	2	10	6
Costs - - - - -	8	10	8
	£82	17	2

J. Methold.

Bompas Serjt., in *Hilary* term, obtained a rule, drawn up on reading the order of 5th *December*, and an offer by the plaintiff's attorney, calling upon the defendants to shew cause why it should not be referred back to the Master to reconsider his finding of the plaintiff's expenses and interest in the said order mentioned, and also to review his taxation of costs under the said order. The affidavit, after setting out the defendant's undertaking, as mentioned in the judgment (*a*), stated the above facts, and alleged that the 2*l.* 10*s.*, allowed for expenses, were less than those which the plaintiff had necessarily incurred; — that interest had been allowed upon 450*l.* from 5th *May* to 17th *June*, when 200*l.* was paid; but that from the 17th *June* the interest, instead of being calculated on the remaining 250*l.* had been allowed only upon the 68*l.* mentioned in the order of 5th *December*, and that the costs, incurred subsequently to the taking out of the summons of 31st *October*, had been disallowed. The affidavit also contained a variety of allegations, which were either contradicted or explained by the affidavits in answer, from which it also appeared that the Master had disallowed the expenses beyond the 2*l.* 10*s.* 6*d.*, because he was of opinion, that the defendants were not

(*a*) *Infrà*, 273.

liable to pay them under the guarantee; — that he had disallowed the costs subsequent to the summons of 31st *October*, on the ground that the plaintiff might have obtained all by that summons which he obtained under the order of 5th *December*, and that such costs were unnecessarily incurred; — and that the interest on the 250*l.* had been reduced in respect of part of the goods seized, which the plaintiff had taken at a valuation.

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Wilde S. G. now shewed cause. The court will not interfere. This is not a case in which the court has sent the matters of a rule to the Master, as their own officer acting under their authority; it is a reference to the Master as an arbitrator, by virtue of an arrangement entered into between the parties and the sheriff's officer. In form, it is a judge's order; in effect, it is agreement of reference.

But if this were a mere reference to the Master by the court, the affidavit, on which the rule was obtained, would be defective, in not pointing out the specific objection. In the ordinary case of a rule for the Master to review his taxation of costs, the objection, to allowance or to the disallowance of the particular items should be stated. Here, it is merely alleged that the plaintiff claimed interest, and that the Master did not allow it. The present defendants are merely sureties for *Wyatt*. As far as they are concerned it is an action on a guarantee. If the plaintiff chooses to take the carriages in 185*l.*, it is doubtful whether *Wyatt* himself could have been charged with subsequent interest upon that portion of the judgment debt.

Interest.

The expenses mentioned in the defendant's undertaking had reference to the costs of the execution, and the Master was right in allowing those costs only which arose out of the execution.

Expenses.

With respect to the costs of the cause, the court will

Costs.

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only interfere when a question of right occurs. The ordinary routine of taxing costs is best left to those who are constantly engaged in taxing costs. The Master was justified in disallowing the costs, incurred subsequently to the service of the summons of 31st *October*; *Ackwood* v. *Read*. (*a*)

Here, the action, though in special *assumpsit*, is for a pecuniary demand.

Bompas Serjt. in support of the rule. With respect to the sum allowed for expenses, the Master has decided that the plaintiff is entitled, under the terms of the guarantee, to nothing but the poundage, and the expense of the levy. It could not have been the meaning of the parties that the words should be understood in so very restricted a sense.

Expenses.

Costs.

With regard to the costs, it is not sufficient to bring a plaintiff within the rule to which allusion has been made, — that the plaintiff seeks to recover one sum certain, if he also goes for something which is uncertain. In *Ackwood* v. *Read* a certain sum was tendered. In *Gover* v. *Elkins* (*b*) the action was *indebitatus assumpsit* for a specific amount, 289*l*. indorsed on the writ. The defendant took out a summons to stay proceedings, on payment of 150*l*. beyond 28*l*., the amount of an alleged set-off. The plaintiff declined to take the sum offered. The defendant pleaded *non assumpsit*, and a set-off for 28*l*., but did not bring the 150*l*. into court, or plead payment or tender. The defendant afterwards applied to amend, by adding a plea of payment, or to be relieved from payment of costs. The application was refused, on the ground, as it would seem, that the defendant had not in the first instance brought the money into court, and that, by not doing so, he had shewn that

(*a*) 7 *Dowl. P. C.* 810. *infrà*, 273. (*a*).

(*b*) 3 *M. & W.* 216.

the conduct of the plaintiff in refusing the 150*l.* was not vexatious. In *Gover* v. *Elkins*, *Alderson* B. said, "The rule is imperative; and, to bring himself within it, the defendant must bring the money into court." (*a*) Here the defendant had not brought the money into court. [*Tindal* C. J. These cases do not apply.] Here the defendants never offered to pay what was due.

Expenses.

TINDAL C. J. In this case the defendants sent to the plaintiff's attorney a letter containing a guarantee to pay, amongst other things, interest upon a judgment which the plaintiff had obtained in a former action against Sir *Henry Wyatt*, and also any expense which the plaintiff might have been or might thereafter be put to, since the execution he had put into Sir *H. Wyatt*'s house. The letter then says, "Sir *H. Wyatt* has placed in Mr. *Fisher*'s (the plaintiff's) name, a cabriolet, which, with the carriage previously transferred, is to go towards

(*a*) *James* v. *Raggett*, 2 *B.* & *Ald.* 776., 1 *Chitt. Rep.* 471. In *Ackwood* v. *Read*, 7 *Dowl. P. C.* 810., the rule deducible from the case of *James* v. *Raggett* is stated by *Parke* B. to be this: "that wherever a plaintiff refuses a sum of money, tendered, through the medium of a summons, in satisfaction of the debt for which the action is brought, and afterwards takes out of court the same sum, when paid in under a plea, it is a *primâ facie* case that he continued the suit for the purpose of making costs, and consequently he ought to pay costs from the time of his refusal." The learned judge goes on to say, "But good cause may be shewn to rebut this inference, and in the present action, which is not brought for a debt, but to recover damages, even supposing a *primâ facie* case to have been made against the plaintiff, he has satisfactorily answered it by shewing, that he had not ascertained at the time the sum of 10*l.* was tendered, nor until after defendant had pleaded, the precise amount of injury done, and that he then found the difference between the two sums so trifling as not to be worth his while proceeding for." And see *Vane* v. *Mechell*, *Barnes*, 284.; *Hartley* v. *Bateson*, 1 *T. Rep.* 629.; *Zeevin* v. *Cowell*, 2 *Taunt.* 203.; *Roberts* v. *Lambert*, *ib.* 283.; *Sawbridge* v. *Coxwell*, 4 *Taunt.* 255.; *Gibbon* v. *Copeman*, 5 *Taunt.* 840., and 1 *Marsh.* 392.; *Last* v. *Benton*, 2 *Marsh.* 478.; *Burmester* v. *Hilch*, 13 *East*, 551.

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payment of the execution to the extent of 185*l.*, t being the value Sir *H. Wyatt* has put upon the c riage; but it is understood, that if the carriage do realise that sum after payment of expenses, Sir *Wyatt* is to pay Mr. *Fisher* the difference between 185*l.* and the sum the carriage might really realis An action having been brought on this guarantee, a judgment having gone by default, the assessment damages was referred, to a very proper person, by order of 5th *December* 1839, whereby it was order that on payment of 68*l.* and such interest and expen as the Master should find that the plaintiff was entit to, as necessarily incurred by him since the executi under the guarantee, within four days after such findi all further proceedings should be stayed. This was therefore an order referring a case to the Master in ordinary way to tax the costs between the parties. Master was placed in the situation of an arbitrator; unless we see that the Master has not exercised ordi discretion, we cannot interfere. With respect to the penses, the decision ought not to be disturbed.

Costs.

No mention is made of costs in the order of the *December;* but this omission appears to have been a m take in drawing up the order; it cannot be supposed th the plaintiff meant to give up the costs; and bo parties appear to have argued before the Master upo the supposition that he had jurisdiction as to the cost Then the question is, whether it ought to go back to t Master, in order that he may allow the plaintiff his cos up to the time of taxation. It is an established rule, th where a specific sum has been tendered and refuse and the plaintiff recovers no more than was tendered, is not entitled to the costs incurred subsequently to t tender and refusal; and, according to one case (*a*), t plaintiff would have to *pay* the costs incurred by the d

(*a*) See the last note, *supra*, 272.

fendant after that period. By the first summons, the defendants offered to pay 68*l.* and costs, with interest upon the judgment, and any expenses which should be found by the Master to have been necessarily incurred by the plaintiff in respect of his having levied the execution. Although the wording of this summons differs slightly from the language used in the letter of guarantee, and that contained in the order of the 5th *December* 1839, I cannot see that the Master has exercised so improper a discretion, with regard to the costs, as to induce the Court to send that matter back to him.

I think, however, that the case should go back to the Master upon the question of interest. Interest.

BOSANQUET J. concurred.

COLTMAN J. As this is not a case referred by an order of the Court, but is one referred to the Master as an arbitrator selected by the parties, I am of the same opinion.

ERSKINE J. concurred.

Rule — absolute, for referring it back to the Master to reconsider his finding of interest, — discharged, as to the reconsideration of his finding of the plaintiff's expenses, and as to the reviewing of his taxation of costs.

BROWN *v.* WILDBORE.

Service of a notice by leaving it at the office of the attorney with a laundress, having the care of that and the other offices in the house, is not good service.

A defendant served with a notice of trial by continuance, where no issue has been delivered and no original notice of trial has been served, omits to return the notice of trial by continuance, and gives no intimation to the plaintiff of the irregularity, for an unreasonable time, and until it is too late to correct it in time to go to trial at the same sittings; — the irregularity is waived.

THIS action was brought to recover 21*l.* 5*s.*, of which 11*l.* 5*s.* was paid into court. On the 28th of *April* notice of trial, by continuance, was served on the defendant's attorney. On the 11th of *May*, *Wilde* S— obtained a rule *nisi* to set aside this notice with costs upon an affidavit made by the defendant's attorney and his clerk, stating that no issue had been delivered, and no original notice of trial served.

Bompas, Serjt. now shewed cause, upon an affidavit made by the clerk of the plaintiff's attorney, stating that on the 13th of *April* he delivered the issue and notice of trial into the hands of a female at the office of the defendant's attorney, at &c., there being no clerk in the office to receive the same, the said female being as the deponent believes, and as she stated, the laundress having the care of the different offices in the house where the office of the defendant's attorney is situate; that the said female told the deponent that she would give the issue and notice of trial to the defendant's attorney, or his clerk, in the morning.

The service on the laundress was sufficient; but, if not, the defendant's attorney, upon receiving the notice of continuance, was bound to give notice to the plaintiff's attorney within a reasonable time, of the irregularity of which he complained, whereas here he has waited thirteen days, taking no steps until it was too late to give notice of trial for the sittings in *Easter* term.

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Wilde S. G., in support of the rule. Service on a laundress is not sufficient, *Lush's Practice*, 438. [*Bosanquet* J. referred to *Archbold*, 7th edition, 210. (*a*)]

The defendant's attorney was not bound to give notice to the plaintiff's attorney of his irregularity, in serving notice of trial by continuance, without having delivered an issue, and without having served an original notice of trial. (*b*)

TINDAL C. J. The issue was not well delivered, nor was the notice of trial well served; but upon receiving

(*a*) *Archbold* refers to *Kent* v. *Jones*, 3 *Dowl. P. C.* 210., and *Alanson* v. *Walker*, *ib.* 258. In the former case, the affidavit of service of a rule nisi at the chambers of an attorney, by leaving it with a laundress who admitted herself to be the attorney's servant, was held to be insufficient, because it did not state that the deponent *believed* her to be so. In the latter case, the affidavit of service of a rule, by leaving it at the defendant's chambers with a *female servant* there, was held insufficient by *Gurney* B., who observed, "the servant may have been a mere laundress." In the former case, the service was clearly insufficient, as, without the statement of belief, the deponent would not, in any way, have authenticated the representation which the laundress had made as to her being the servant *to the attorney*. In the latter case, it was merely a casual expression, used by the learned judge by way of illustration; and even in that expression, and in the case to which it applied, there was nothing to connect the female servant, or the imaginary laundress, with the occupier of the chambers. And see *Strutton* v. *Hawkes*, 3 *Dowl. P. C.* 25.; *Chaffers* v. *Glover*, 5 *D. P. C.* 81., *Salisbury* v. *Sweetheart*, *ib.* 243.; *Hitchcock* v. *Smith*, *ib.* 248.; *Thomas* v. *Lord Ranelagh*, *ib.* 258.; *Carew* v. *Winslow*, *ib.* 543.

(*b*) Formerly, the rule of practice in this court was stated to be, that "a motion to set aside proceedings for irregularity should be made as soon as the plaintiff, by taking a new step in the cause, shews that he means to proceed; *Fletcher* v. *Wells*, 1 *Marsh.* 550., 6 *Taunt.* 191. And see *Dand* v. *Barnes*, 6 *Taunt.* 5., 1 *Marsh.* 403.; *Ledwick* v. *Prangnell*, 1 *B. Moore*, 299. But now, by *R. H.* 2 *W.* 4. *reg.* 33., "no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step, after knowledge of the irregularity." And see *Wright* v. *Warren*, 3 *Mo. & Sc.* 163.

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the notice of continuance, the defendant's attorney ought to have returned it immediately. We think that the rule should be made absolute upon the defendant's undertaking to go to trial at the first sittings in next term; the costs of the motion to be costs in the cause.

Rule absolute accordingly.

END OF EASTER TERM.

DIRECTION OF THE JUDGES RESPECTING THE COSTS OF MAKING A JUDGE'S ORDER A RULE OF COURT.

Resolution of the Court of Exchequer, 27th *May* 1840.

MEMORANDUM. — It is resolved by the judges, that, when a judge's order is made a rule of court, it shall be a part of the rule of court, that the costs of making the order a rule of court shall be paid by the party against whom the order is made, provided an affidavit be made and filed, that the order has been served on the party *or his attorney* (*a*), and disobeyed.

Sent to the Common Pleas Rule Office on the 29th of *May* from the Exchequer Office, and submitted by Master *Ray* to the Lord Chief Justice, who directed the Masters of the Common Pleas to act in accordance therewith.

(*a*) The words in italics were added by the Court of Exchequer on the 28th of *May* 1840. On the 6th of *November* 1840, the Masters met and decided that service on an *agent* was sufficient.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS, 1840.

IN

Trinity Term,

IN THE

THIRD YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in Banc during this Term were,

TINDAL C. J.	ERSKINE J.
COLTMAN J.	MAULE J.

JOHN ATTWOOD *v.* JOHN TAYLOR, JAMES HENRY SHEARS, and ROBERT SMALL.

ASSUMPSIT. The declaration, entitled of 21st of *June* 1838, contained the following statements: — 10th of *June* 1825, by memorandum of agreement

An estate is contracted to be sold at a sum to be paid by six instalments, with additions, in the form of interest, at 5 per cent. until the day of payment thereof. By a subsequent contract, it is agreed, that the last instalment, instead of being paid at the appointed day, shall remain on mortgage at 4½ per cent. for 14 years, but that the stipulations of the first contract, as to the previous instalments, shall continue in force. The reduction from 5 to 4½ per cent. is dependent upon the fulfilment of the terms of the first contract with respect to the prior instalments; and these being suffered to remain unpaid long after the appointed periods, and no mortgage having been executed, the vendor is entitled to recover 5 per cent. upon the last instalment, as well as upon the others.

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In special *assumpsit* upon a contract of sale, the defendant pleaded payment of money into court and *non damnificatus ultrà*. *Quære*, whether the defendant can give the contract in evidence for the purpose of shewing a partial defeasance in another part of the contract, not set out in the declaration, and prove that the circumstances, by which the contract was to be so partially defeated, have arisen. (*a*)

By a contract of sale, the purchaser is to pay a certain sum by six instalments, and also 5 per cent. half yearly, from the day appointed for the payment of the second instalment, upon the four remaining instalments, until paid; such additional sums by way of percentage to be secured by the bond (*b*) of the purchaser. In the contract, and also in the declaration thereon, this additional percentage is called "interest" upon the instalments. Neither the instalments nor the additional percentage are paid as they become due, nor is any bond given: Held, that the purchaser is chargeable with interest upon the last four instalments until actual payment of those instalments, but that the jury are not bound, either at common law or under 3 & 4 *W.* 4. *c.* 42. *s.* 28., to give interest upon the additional percentage treated by the parties as "interest."

Ruled at *nisi prius*, that a plaintiff cannot, for the purpose of excusing his apparent *laches* in deferring his action for several years, give in evidence an order for an injunction obtained by the defendant in a suit in equity instituted by the defendant against the plaintiff, — by which order the plaintiff was restrained from suing during the whole of that period, — without producing the bill and answer. *Per* Lord *Abinger* C. B. (*c*) *Tamen quære.*

between the plaintiff and the defendants, the plaintiff agreed to sell, and the defendants to purchase, certain freehold and leasehold estates, iron works, collieries, and other property, at the price of 600,000*l.*; and it was thereby agreed that the sum of 25,000*l.* in Exchequer bills, should, on the signing of the agreement, be

(*a*) And see *Fillieul* v. *Armstrong*, 7 *Ad. & Ell.* 557., 2 *Nev. & P.* 406.

(*b*) Where goods are sold, to be paid for by bill, the purchaser, not giving the bill, is liable for the interest which the bill, if given, would have carried: *Porter* v. *Palsgrave*, 2 *Campb.* 472. And being, in effect, part of the consideration for the sale, this interest may be recovered in an action of debt or of *indebitatus assumpsit* for the price of the goods, brought after the time when such bill would have become due: *Marshall* v. *Poole*, 13 *East*, 98. In the latter case, Lord *Ellenborough* says, "Here, the agreement is, to give a *security* which would carry interest; and, as the performance of the contract would have entitled the plaintiffs to interest upon the bill, they ought not to be prejudiced by the breach of it." So, in *Becher* v. *Jones*, in error, 2 *Campb.* 428. n., the Court of Exchequer Chamber allowed interest, after judgment by default, in an action for not accepting a bill for the price of goods sold at 709*l.* 16*s.* 6*d.*, to be paid for at the expiration of four months from the sale and delivery, by

paid by the defendants into the hands of certain bankers, to the joint account of the defendants and the plaintiff, by way of deposit, which Exchequer bills were to be paid over to the plaintiff on his giving possession of the premises sold; and the defendants agreed to pay to the plaintiff the further sum of 200,000*l.* on the 1st of *October* then next; and the plaintiff agreed, on payment of such sum of 200,000*l.*, and on the title's being accepted, to give full and complete possession of the premises unto the defendants, and, at the same time, if required, to convey, assign, and assure to trustees, in trust to secure the residue of the purchase money and *interest* (*d*) by the instalments thereinafter mentioned,

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giving a bill of exchange to the seller, payable two months after date. The rule moved for in that case, and afterwards made absolute, was, that it should be referred to the clerk of the errors to calculate the amount of interest upon the final judgment, from the time of the service of the allowance of the writ of error until the affirmance of the judgment. And see *Edwards* v. *Vere*, 5 *B.* & *Ad.* 282., 2 *Nev.* & *M.* 120. 124, 125. Here, the defendants had engaged to give a bond for the half-yearly sums accruing due for interest; and if they had done so, the plaintiff might have sued for the half-yearly sums, as the principal secured by the bond, with interest thereon, corresponding in amount with the interest sought to be recovered in this action. This would be a title to the interest *ex contractu*, and independent of the statute 3 & 4 *W.* 4. *c.* 42. *s.* 28. (extended to *Ireland* by 3 & 4 *Vict.* *c.* 105. *s.* 54.) Under this contract, it lay upon the defendants to prepare and tender the bond. *Willes*, 65., 10 *B.* & *Ad.* 55. Omitting to do so, they would be defaulters, even if they had not prevented the plaintiff from enforcing his right to the bond, or the advantages which the bond was intended to represent and secure, by filing a bill and obtaining an injunction.

(*c*) Dissenting from *Blower* v. *Hollis*, *infrà*, 289 (*a*), 290 (*a*).

(*d*) All contracts, instruments, and acts done (*Stroud* v. *Lady Gerrard*, 1 *Salk.* 8.), whether in writing or not, are to be pleaded according to their legal effect; because the pleader professes and undertakes to set forth that which the parties have done, — that which they have really effected, — not what they have said, and supposed, that they were doing. Where one joint-tenant enfeoffs his companion without deed (though the feoffment, if in writing signed by the feoffor, would have been sufficient to pass the estate tois

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and subject thereto in trust for the purchasers, or as they should direct and appoint; and the plaintiff agreed, within one month, to deliver to the defendants,

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stranger), it is wholly inoperative between the joint-tenants; but if the feoffment be by deed, though it cannot operate as a feoffment, inasmuch as the feoffee has already that very seisin which it is the object of the feoffment and livery to give him, yet as it testifies the intention of the parties that the feoffee shall have sole seisin of the land, the deed will operate as a release, and must be so pleaded. So as to all other forms of conveyance, *Barker* v. *Lade*, 4 *Mod.* 149., 2 *Ventr.* 145., 3 *Lev.* 291., *Skinner*, 315. *S. C. Howell* v. *Richards*, 11 *East*, 633.; *Moore* v. *Earl of Plymouth*, 3 *B. & Ald.* 66.; *Wilson* v. *Bagshaw*, 5 *Mann. & R.* 448. 1 *Wms. Saund.* 235 *b.* (9.); 2 *Wms. Saund.* 97 *b.* (2.); *Com. Dig. Pleader* (C. 37.); *Bac. Abr. Pleas and Pleading* (I. 7.); *Steph. Plead.*, 4th ed. 339, 417.

The rule is less strict where a conveyance is alleged merely as matter of inducement, or introduction, to that which forms the substance of the allegation, *Bultivant* v. *Holman*, *Cro. Jac.* 537.; better reported in 2 *Roll. Rep.* 110. by the name of *Buttifant* v. *Holeman*.

The rule does not apply to actions for defamation, written or verbal, because there, the publication of the particular words is, itself, the *act* done.

Under the statute of uses, inartificial words in a deed, if they express the intent of the parties, will raise a use, which the statute will execute; *Edward Fox's case*, 8 *Co. Rep.* 93 *b.*

If, on the 1st of *January* 1840, *A.* sell a horse to *B.* for 100*l.*, payable, with 5 per cent. interest, on 1st of *January* 1841, the transaction amounts to a sale of a horse for 105*l.*, payable at a future day, and nothing else; and if the 100*l.* should be paid without the 5*l.*, the vendor must declare for the price, or a portion of the price, of a horse sold and delivered, and not for interest.

Here, in declaring upon the contracts according to their legal effect, the mode of payment would perhaps be stated thus:— 25,000*l.* deposit; 200,000*l* on 1st *October* 1825; 8125*l* (which would be the sum treated as half a year's interest upon 325,000*l.*), on the 1st of *April* 1826; 50,000*l.* on the 15th of *April* 1826; 6875*l.* (which would be the sum treated as half a year's interest on the then residue of 275,000*l.*) on the 1st of *October* 1826; 100,000*l.* on the 15th of *October* 1826; 4375*l.* (which would be the sum treated as half a year's interest on the then residue of 175,000*l.*) on the 1st of *April* 1827; 100,000*l.* on the 15th of *April* 1827; 1875*l.* (which would be the sum treated as half a year's interest on the then residue of 75,000*l.*) on the 1st of *October* 1827; and 75,000*l.* on the 15th of *October* 1827. These ten sums, amounting to 575,250*l.*,

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or their solicitors, an abstract of title to the property sold, and to deduce a good title thereto, with certain exceptions. And the defendants agreed to pay to the plaintiff the residue of the purchase-money by the following instalments, viz. 100,000*l.* on or before 15th *April* 1826; 100,000*l.* on or before 15th *October* 1826; 100,000*l.* on or before 15th *April* 1827; and 75,000*l.* on or before 15th *October* 1827; with *interest* for the same sums, at the rate of 5 per cent. per annum, to be reckoned from 1st *October* then next until *the day of payment* thereof, such interest to be paid by equal *half-yearly payments*, and to be secured by the joint and several bond of the defendants; and it was also thereby further agreed, that the plaintiff should pay all taxes, &c. in respect of the property contracted to be sold up to the time of giving possession, from which period the defendants should be entitled to the rents and profits.

Second contract.

1st of *October* 1825. By a certain other memorandum of agreement between the plaintiff and the defendants, after reciting, in part, the first agreement, and also reciting that the said sum of 25,000*l.* in exchequer bills had been accordingly paid, and that it had been agreed, in consequence of the then present state of the title, that

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may be said to be the only sums which constituted the purchase money of the estate, after the abatement of the 50,000*l.* made by the third contract. The contracts do not appear to have contemplated any payment by the name, either of principal or interest, after the 15th of *October* 1827, and, although the words reserving interest, are sufficiently large to meet the possible case of the payments' being deferred until after that period, it cannot be said, strictly, that the payments which would become due for interest, in the event of the non-performance of that which both parties agreed *should* be done, were sums payable on a day certain; although, therefore, 8125*l.*, and not 6875*l.*, would be the sum payable on the 1st of *October* 1826, if the 50,000*l.* which ought to have been paid on the 15th of *April*, remained unpaid on the 1st of *October*, yet, according to the terms of the contracts, the 6875*l.* and not the 8125*l.*, would be the sum which had been distinctly *made* payable on the 1st of *October* 1825, *as on a day certain.*

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the first agreement should be varied and otherwise added to, it was witnessed, that upon the delivery of the said exchequer bills, and payment of the said 200,000*l.* to the plaintiff, in addition to any other payments required to be made by the first agreement on delivery of possession, the defendants should be let into the immediate possession of so much of the premises sold, as were then in the actual occupation of the plaintiff, and into the receipt of the rents and profits of the residue thereof, without such possession being an acceptance of the title, or an abandonment, on the part of the defendants, of their right to have all valid objections to the title removed, and all defective evidence supplied, by, or at the expense of, the plaintiff. And the plaintiff did thereby further agree, that he, or his heirs, executors, or administrators, would forthwith proceed, and, within a reasonable time after the date thereof, remove all valid objections to the title, and complete any evidence which might be defective therein, and make the title as perfect as it should be within the power of the plaintiff, his heirs, &c., to do; and should on or before the 15th of *April* then next, and that, whether the title should have been then fully completed or otherwise, and without prejudicing the right of having the same completed where then defective, and with all other necessary parties whose concurrence could, at the time, be obtained for that purpose, convey, or otherwise assure, the premises sold, in manner and upon the several trusts provided for in the first agreement, and in all respects according to the same agreement, so far as related to such assurance or assurances, and in the same manner as if the title had been then complete and accepted, and possession given thereon under the first agreement; provided nevertheless, that nothing contained therein was intended to disturb or alter the payment of the said three several instalments of 100,000*l.* each, or of the interest

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thereof, on or before the days or times appointed in that behalf in the said first agreement, or the right of the plaintiff to have the same respectively paid to him accordingly; and also the interest of the said sum of 75,000*l.* down to the 15th *October* 1827 inclusive; and it was also thereby further agreed that nothing therein contained should disturb the first agreement, or alter the terms thereof, except so far as such terms, or any of them, were inconsistent and at variance therewith, or with the observance and performance of any matter therein contained, or to be done in pursuance thereof, but that the first agreement should, in other respects, be observed and performed in the same manner as if the second agreement had not been executed.

Third contract.

4th *November*, 1825. By a third agreement made and endorsed on the second agreement,—after reciting that since the second agreement had been prepared and perfected ready for execution by the said several parties, but before the execution of the same by them, it had been agreed to vary and alter the same, and also the first agreement, — it was agreed, that the defendants, their heirs, executors, and administrators should be exonerated and discharged from all personal liability for the payment of any sum or sums of money whatsoever by reason or means of their having been parties to, and signed, the first agreement, or from any act incidental thereto, or consequent thereon, except that they should be and remain answerable for, and liable to, the payment of the *interest* on the remaining instalments of the said purchase money as in the first agreement expressed, so long as they remained in possession of the premises, or any part thereof; and that the plaintiff should be satisfied, as his only means of enforcing the payment of the subsequent instalments, with the security of the premises, and which were to be conveyed to trustees in manner in the second agreement expressed, and with the usual

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powers for enabling the trustee or trustees for the time being to sell a competent part, and thereby raise and pay such of the said instalments as should fall due, and from time to time when and as the same should fall due, with the respective interest then due in respect of the purchase-money or any part thereof, and with all necessary powers and authorities to give discharges for the purchase-money, and exempting purchasers from, &c., it being nevertheless agreed, as between the parties thereto, that no sale should be made, or proceedings taken with a view thereto, until the plaintiff should have given to the defendants six calendar months' notice in writing, previous to each sale, nor until the expiration of the time mentioned in such notice; and it was thereby further agreed that plaintiff might be a purchaser at each or either of the said sales of the premises then sold; and it was thereby agreed that 50,000*l.* only should be paid to the plaintiff on the 13th of *April* next after the date thereof, the further sum of 50,000*l.* by the first agreement provided to be paid on that day, having been agreed to be abated from the purchase-money.

Mutual promises *in respect of the three agreements.*

4th of *November*, 1825. The 25,000*l.* invested in exchequer bills was duly paid over to the plaintiff, according to the tenor and effect of the several agreements.

Afterwards, on the day and year last aforesaid, the further sum of 200,000*l.*, other part of the said purchase-money in the first agreement mentioned, was duly paid to the plaintiff by the defendants; and upon the payment of the said several sums of 25,000*l.* and 200,000*l.* the defendants were let into full and complete possession of the premises, and became and were, and from thence hitherto have been, and still are, in full and complete possession thereof.

Breach.

Yet the defendants did not, nor would, pay to the plaintiff the interest upon the residue of the purchase-

money, at the rate of 5 per cent. per annum, from the 1st *October* next after the date of the first agreement until the day of payment thereof, by the half-yearly payments, and in manner, in the said several agreements in that behalf mentioned, or otherwise howsoever; but on the contrary thereof, although the sum of 325,000*l.*, residue of the said purchase-money, became and was due and payable long before the commencement of this suit, to wit, on the days and times in that behalf before mentioned, and still is due and payable from the defendants to the plaintiff, and although the defendants now are, and, from the time of making the *third* agreement, continually have been, in the full and complete possession of the premises sold, and in receipt of the rents and profits thereof; and although afterwards, to wit, on the 1st of *April* 1828, a certain large sum of money, to wit, 89,375*l.* for interest upon and in respect of the said sum of 325,000*l.*, so being the residue of the said purchase money so unpaid as aforesaid for five years and a half, which expired on the day and year last aforesaid, and also a certain other sum, to wit, 20,000*l.*, as and for interest upon the said sum of 89,375*l.* from the several days and times at which the said interest ought to have been paid, became and were due, and still are in arrear and unpaid, from the defendants to the plaintiff; of all which several premises the defendants afterwards, to wit, on the day and year last aforesaid, had notice. Nevertheless, the defendants have not as yet paid the said sums of 89,375*l.* and 20,000*l.*, or either of them, or any part thereof, to the plaintiff, although often requested so to do, but have *hitherto* altogether neglected and refused, and still do neglect and refuse, so to do.

Second count, for 110,000*l.*, on an account stated.

Plea (entitled of 27th *June* 1838), *actio. ulterius non;* Plea.
because the defendants say, that they now bring into

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court 87,312*l.* 10*s.*, ready to be paid to the and that the plaintiff has not sustained dama greater amount than 87,312*l.* 10*s.* in respec causes of action in the declaration mentioned. cation, and prayer of judgment. (*a*)

(*a*) The plea introduced no new *affirmative* allegation, except the payment of money into court, which, being an act accompanying the plea, appears to require no verification. The allegation that the plaintiff has not sustained damage to a greater amount, is a mere negative allegation, requiring no verification, as, except in certain cases in which the law presumes the affirmative, the party asserting a negative proposition is not bound to prove it, and is therefore not bound to tender such proof by a *hoc est paratus verificare*. *Co. Litt.* 303 *a*. *Com. Dig. Pleader* (E. 29.).

Thus, in *assumpsit* by an attorney for his fees, where the defendant pleaded—no bill delivered under the plaintiff's hand,—a verification was held, even before the 4 *Ann. c.* 16. *s.* 1., to be unnecessary. *Millner* v. *Crowdall*, 1 *Show.* 338. So, though where a defendant vouches a record, he must generally verify it with a *prout patet per recordum*, that is unnecessary where a record upon which the plaintiff has declared, is vouched by the defendant in support of a negative proposition. *Fanshaw* v. *Morrison*, 2 *Salk.* 520. *A fortiori*, a plea of *nul tiel* record need not be verified. *Obin* v. *Knott*, *Fortescue*, 334. *Bro. Abr. Averment*, pl. 20. 58. As the addition of a verification, where it is unnec merely surplusage, i in practice, to insert tion after a plea of nificatus, riens per award made, no m rolled, non assumpsi annos, 3 *Vin. Abr.* 3 15. (The proper for ing in these cases see conclude the plea with upon the defendant ment.") It is also t course to verify an a cognisance (althou equally unnecessary. 303. *a.*; *Bret's Ca* 342.; *Throckmorton Ib.* 163.; *Bro. Abr.* pl. 81.), and other pl are simply in the n taking less time to m sertion than to consid it ought to be made. 4 *N. & M.* 507. (*b*)

Every plea which a verification, conclu prayer that the court judgment; and pleas exception of avowrie nisances, and a very which concluded wit of judgment, must, i tained any affirmative have contained a ve and the prayer of might, in all pleas, b by a verification, cases of avowries a sances and of pleas the negative, the was matter of surplus

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Replication (entitled of 29th *June* 1838), that the plaintiff has sustained damages to a greater amount than the said sum of 87,312*l.* 10*s.* in respect of the causes of action in the said declaration mentioned.

Upon the trial before Lord *Abinger* C. B., at the *Stafford* Summer assizes, 1838, *Wilde*, Serjt. (with whom were *Talfourd*, Serjt., *Maule*, and *R. V. Richards*,) for the plaintiff, offered to put in an order of the Court of Exchequer of 28th *February*, 1829, purporting to be made in a suit in which the now defendants were plaintiffs, and the now plaintiff was defendant, whereby the now plaintiff was enjoined not to proceed to enforce the several agreements. It was objected by Sir *Wm. Follett* (with whom were *Whateley* and *W. J. Alexander*) for the now defendants, that the order for the injunction could not be read without first proving the existence of the suit in which the order purported to be made, by producing the bill and answer. It was answered that the order, being issued by a court of competent jurisdiction, the party enjoined would be bound to abstain from doing the act enjoined against, even if the suit in which the order purported to be made had no existence; and that this was not like the case of a deposition, in which it is sought to charge one of the parties in the suit by the statement of a third person, by which statement the party would not be bound unless the suit were regularly constituted; and *Blower* v. *Hollis* (*a*) was

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this frequent adoption of the verification in every form of plea which did not conclude to the country, it became not unusual to divide pleas between pleas concluding to the country and pleas concluding *with a verification*; the latter being a short, though somewhat inaccurate, mode of describing—pleas concluding to the court with a prayer of judgment, *usually*, even where not necessarily, preceded by a verification. And see *Doctrina Placitandi*, 50.; 1 *Wms. Saund.* 235. (8.); *Stephen on Pleading* (4th ed.), 468.

(*a*) 1 *Cr. & M.* 393. 3 *Tyrwh.* 356., where it was held that an order of the Court of Exchequer, purporting to be an order for an attachment for non-pay-

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cited. The learned Judge, however, said that he did not agree with that case, and ruled, that the order could not be read until the bill and answer were produced. (*a*) The bill and answer were accordingly put in. One order restrained the now plaintiff from proceeding to recover the instalments then due, and for which he had brought his action, and also from bringing any further action, upon the half-yearly payments of interest being brought into court. By an order of the 2d of *May* 1831, publication was enlarged upon the terms that no further payment should be made until the hearing of the cause. The plaintiff then proved the order of the House of Lords, dismissing the bill with costs, and referring it to the Court of Exchequer to make such further order as the justice of the case required. (*b*) The order of the Court of Exchequer, made in pursuance of that of the House of Lords, was also produced. These documents were put in for the purpose of shewing that until just before the commencement of the present action the plaintiff had been precluded, by the proceedings in equity, from enforcing the payment of the instalments. An accountant proved that the amount of interest on 8,520*l.* payable every half year from the 1st of *April* 1833 (when the defendants discontinued their payments), the 7th of *November* 1838 (the 5th day of *Michaelmas* term), would be 13,614*l.* 19*s.* 2*d.* at 5*l.* per cent., taking simple (*c*) interest only for each half year, and that the amount of the eleven half-yearly instalments of 8520*l.* was 89,375*l.* A letter of 28th *March* 1826, from the defendants to

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ment of the costs of a certain suit, is *primâ facie* evidence to support an allegation, "that a certain suit had been and was depending in Her Majesty's Court of Exchequer."

(*a*) The effect of this unexpected decision was, to compel the plaintiff to produce the bill and answer filed in the Court of Exchequer, and, thereby, to relieve the defendants from the necessity of going into evidence and of giving a reply.

(*b*) *Vide infrà*, 301.

(*c*) *Vide infrà*, 296.

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the plaintiff was read, wherein they say, "The 15th *April* is the day we had fixed to pay you the half year's interest on the outstanding 325,000*l.*, and you will please to recollect that the payments were protracted from the 1st *April* and 1st *October* to the 15th of those months respectively, in order to meet the money market after the issue of the dividends at the Bank. This does not affect the period at which the interest actually becomes due, namely, the 1st of those months."

The plaintiff's case having closed, Sir *William Follett* submitted, that the plaintiff was bound to put in the contracts declared upon, in order that the jury might have before them those contracts, and upon looking into them take into their consideration whether, upon the whole, they ought or ought not, under the circumstances, to give the interest claimed.

The learned judge ruled, that if the defendants meant to insist, that by particular parts of the contracts it would appear that the defendants were not bound to pay interest, it was for them to produce the contracts. (*a*)

No evidence was put in on the part of the defendants, but from the answer of the now plaintiff to the bill in the Exchequer, (which had been produced in consequence of the decision of the learned judge (*b*) that the order for the injunction could not otherwise be read,) the defendants read a further proviso in the second contract, which is not noticed in the declaration. After the proviso, (which is set out in the declaration), "that nothing contained in these presents is intended to disturb or alter the payment of the said three instalments of 100,000*l.* each, or of the interest thereof, on or before the days or times appointed or mentioned in that behalf in the said recited agreement, or the right of the

(*a*) See *Edwards* v. *Stone*, 1 *Wms. Saund.* 58. *e*; *Williams* v. *Sille*, 2 *Campb.* 519. And see *Gordon* v. *Gordon*, 1 *Stark. N. P. C.* 294.

(*b*) *Suprà*, 290. (*b*)

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said *John Attwood* to have the same respectively paid to him accordingly, and also the interest of the said sum of 75,000*l.* down to the 15th day of *October* 1827 inclusive," the second contract continues thus: "but it is hereby further agreed, that instead of the said instalment of 75,000*l.* being paid on the said 15th day of *October* 1827, the said instalment of 75,000*l.* shall be left upon the security of the said estates and property, at interest, payable half-yearly, at the rate of 4½ per centum per annum, and to be then made by way of mortgage to the said *John Attwood*, and with a covenant to pay the same, as well principal as interest, and to continue for a period of fourteen years from the said 15th day of *October* 1827, and also that if it shall happen, when the time would have arrived for payment of the said instalment of 75,000*l.*, according to the terms of the said recited agreement (namely, the said 15th day of *October* 1827), that there shall be any valid objection or objections then existing to the said title, either as to the whole or as to any part of the premises therein comprised, or there shall be any defect of evidence in the said title unsupplied, or if any legal estate shall be then outstanding, in trust for the said *J. A.* or his heirs, either by express declaration or by construction of law, in all or any of the premises so contracted to be sold, and not then got in, but which ought to have been got in by him or them for the benefit of the said contract (save and except, nevertheless, as to any defects in the title which are otherwise provided for by the said recited contract, or in the schedule thereto,) then it is hereby further agreed, that so far as relates to any and every such objection, evidence, or outstanding legal estate (except as last aforesaid) and which can or may, by or on the part of, the said *J. A.* or his heirs, be, or which ought to have been, by him or them, previously removed, supplied, or got in, the same respectively shall or may be removed,

supplied, or got in by the said *J. T.*, *J. H. S.*, and *R. S.*, their heirs, executors, &c., or by their solicitors, and under their direction, at the costs, nevertheless, and charges of the said *J. A.* or his heirs, executors, &c., and that so far as relates to any and every such objection, or evidence, or outstanding legal estate, which it shall not be in the power of the said *J. A.* or his heirs, executors, &c., either by suit or otherwise, to remove, supply, or get in as aforesaid, the same shall be waived by or on the part of the said *J. T.*, *J. H. S.*, and *R. S.*, their heirs, executors, &c., and in all and every such event, and in every such case of objection, evidence, or legal estate, whether the same be or be not at the time capable of being removed, supplied, or got in as aforesaid, (save and except and unless where the same is or are otherwise provided for by the said recited contract or the schedule thereto,) he the said *J. A.* shall make and execute, and he doth hereby accordingly agree to make and execute his bond or bonds unto the said *J. T.*, *J. H. S.*, and *R. S.*, their heirs, executors, administrators, and assigns, some or one of them, in a sufficient penalty or penalties, and deliver the same to them at the time of the payment of the said last-mentioned instalment of 75,000*l.*, and to bear even date therewith, with a condition or conditions, to be thereunder respectively written, for the purpose of not only indemnifying, and keeping indemnified, the said *J. T.*, *J. H. S.*, and *R. S.*, their heirs, executors, &c., from and against all and every the consequences which shall or may arise to them, or any of them, by reason of any defect or defects then remaining in the said title, (except as last aforesaid,) or in the assurance or assurances so to be made on or before the said 15th day of *April* now next, and that, either for ever, or as the case may be, during and until such defects respectively shall be remedied or cease or determine, and also, as a con-

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sequence thereof, of reimbursing to them all costs, disbursements, damages, and expenses which they or any of them shall incur, not only in respect thereof, but also all costs, disbursements, and expenses as they, he, or any of them shall have incurred in removing or supplying any such defect or defects whatever in such title or in such assurance or assurances as aforesaid; and then also it is hereby further agreed (except in cases of defects already provided for by the said recited contract, or in the schedule thereto), that the said last-mentioned instalment of 75,000*l.*, and the interest thereof during the said period of fourteen years, and the security thereby agreed to be given for the same, shall be held upon or be subject to the same or the like trusts by way of indemnity as are hereinbefore mentioned, or intended of and concerning any investment which may be made thereof, or any part thereof at the expiration of the said period of fourteen years, pursuant to the provision next hereinafter contained; and then also it is hereby further agreed (except as last aforesaid), that the whole or a competent part or parts of the said investment of 75,000*l.* shall, at the end of the said period of fourteen years, be appropriated and set apart and invested in the names of four trustees (two whereof are to be appointed by the said *J. A.*, his executors, &c., with liberty to fill up any vacancy or vacancies therein from time to time, and the remaining two trustees to be appointed by the said *J. T.*, *J. H. S.*, and *R. S.*, their heirs, executors, &c., and with the like power of filling up any vacancy, &c.); to the intent nevertheless, and so that such investment or investments may be held, and with a declaration to that effect, to be then signed by the said parties and the said trustees, that such investment or investments was or were made, and shall be held, upon trust, in the first place as a security or securities, collaterally with the condition or conditions of the said last-mentioned bond or bonds of

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the said *J. A.*, or his heirs, for the due observance and performance of the same condition or conditions, and every part thereof, and for the payment and reimbursement of the several costs, charges, disbursements, damages, and expenses hereinbefore referred to, and to be mentioned or referred to in the same condition or conditions, and of all moneys recoverable under the said bonds, and each of them, and subject thereto upon trust for the said *J. A.*, his executors, &c., and upon further trust, in the meantime, and until the principal shall be wanted for answering and satisfying any or either of the purposes for which the principal is or are primarily made liable as aforesaid, to permit and suffer the said *J. A.*, his executors, &c. to receive the income and interest thereof to and for his and their own use and benefit.

On the part of the plaintiff it was contended, that the eleven instalments of interest, to which, it was admitted on the record that, the plaintiff was entitled under the terms of the contract, on the days mentioned in the declaration, were *sums certain*, within the meaning of 3 & 4 *W.* 4. *c.* 42. s. 28. (*a*), payable, by virtue of a written instrument, at a certain time. That upon a contract to pay principal and interest on a given day or days, two distinct debts arise; and that after the day or days of payment are past, an action may be brought to recover either or

(*a*) Which enacts, "That upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor, that interest will be claimed from the date of such demand until the time of payment; provided that interest shall be payable in all cases in which it is now payable by law."

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both. That the question here was, whether the several sums of 8125*l.*, made payable half-yearly, were not sums certain recoverable on a particular day, and subject to those legal consequences which attach to other debts. That the jury having power, under the statute, to give interest, justice cannot be done to the plaintiff, unless interest be given him. That when one of these sums of 8125*l.* became due, the amount, if paid, might have been invested, or used in trade, or applied in the redemption of a mortgage, or of any other charge bearing interest. That it could not be supposed that so much capital, in the hands of the defendants, carrying on an extensive trade, could have been totally unproductive. That it was perfectly incredible that any one of these sums of 8125*l.*, which it is admitted on the record, ought to have been paid by the defendants to the plaintiff on a particular day, should have remained in their hands unemployed and unproductive; but that supposing this to have been the case, it would be solely the fault of the defendants.

The matters urged for the defendants were, that an enormous price had been paid for this property, consisting of about 200 acres; that the defendants had a *bonâ fide* and reasonable cause for filing their bill and obtaining the injunction which caused the delay. That the *bonâ fides* of the defendants' conduct was shewn by all the circumstances of the case, and that it was established by the elaborate judgment of Lord *Lyndhurst*, who had decided, in favour of the now defendants both upon the law and the facts, that they had reasonable cause for instituting these proceedings. That the object of the statute was, to enable juries to give interest where the payment of debts was withheld, in a variety of cases, in which, for want of a contract to pay interest, parties were delayed; but that the statute did not apply to cases where the question of interest had been provided

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for by the stipulations which the parties themselves had embodied in their contract, as was the case here. (*a*) Still less was it intended by the statute, that the plaintiff should be enabled to recover compound (*b*) interest, yet that is the only question between the parties upon this part of the case. That if, as had been contended on the other side, the principal and the reserved interest were to be considered as two distinct debts, this absurdity would follow, — that supposing the reserved interest to be paid without the principal, the creditor would be entitled to recover damages in the nature of interest for the detention of that principal. That the argument used on behalf of the plaintiff would, if true, shew the propriety of allowing compound interest in every case, as there was no case in which it might not be said, that if the creditor had received the interest on the day on which it became due, that creditor might have benefited by investing his money at interest. That, under the third agreement, the plaintiff

(*a*) By this contract no *loan* was made by the plaintiff to the defendants, nor was any antecedent debt *forborne*. There could, therefore, be no contract for any thing properly called *interest*. What is treated as a reservation of interest in the contract, is an agreement for an absolute addition to the purchase money if the large instalments were paid at the appointed times, and for further conditional additions, in case the payment of those large instalments did not proceed in the manner prescribed by the contract.

(*b*) Compound interest is where, at particular rests or intervals, the whole balance then due, however constituted, is carried on as a capital bearing interest. If compound interest is calculated upon ten half-yearly instalments, the interest upon the first instalment will have generated interest through nine successive descents before it appears in the last balance. Here, simple interest only was claimed; and the contest really was, whether the simple interest claimed was sought to be recovered in respect of a sum, which was to be considered as a principal sum, or was sought to be recovered in respect of a sum which was itself, interest. In the latter view of the case the demand would be one step towards a claim of compound interest, though stopping at the first term of that which might be a long or an infinite series.

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was bound to leave the purchase-money on the estate, with power to sell, and to pay himself principal and interest; and that, if he had sold under the power, the only interest which a court of equity would have allowed him to take, would, without any doubt, be the simple interest of 5 per cent. upon the 325,000*l.* That, in the case of a mortgage containing a covenant for the payment of interest at 5 per cent. (*a*), with a power of sale, although the mortgage interest may be many years in arrear, yet if the estate be sold under the power, the mortgagee can only take his principal with simple interest, although that interest consisted of sums payable at particular days, according to the terms of a written contract. (*a*) That for these reasons the jury had no *power*, under the late statute, to award the compound interest claimed against the defendants, and that this would have appeared distinctly on the record, if the contract had been declared upon according to its legal effect, as to the mode of payment. That, if the jury possessed the power, they would not exercise it in the present case, against parties who had already been saddled with such immense payments in the shape of principal and interest, besides the enormous costs attending the protracted litigation which had taken place; which principal and interest had been retained by the defendants solely on the ground of a decree of the court of Exchequer, in which they were informed by Lord *Lyndhurst* C. B. that the money was not payable, and that they were not bound to pay it. That, assuming that

(*a*) In general, the express contract for interest in the mortgage deed, extends no further than the day on which the principal is nominally made payable. Interest, beyond the day appointed for repayment, appears to be recoverable only in the shape of increased damages for the breach of the contract, in actions of covenant or assumpsit, or of damages sustained on occasion of the detention of the debt, in an action of debt. And see *Dickenson* v. *Harrison*, *post*, 306.

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judgment to be erroneous, the course was not to throw upon either party, exclusively, the costs occasioned by the mistake of a judge. (*a*)

Lord *Abinger* C. B. stated to the jury that, inasmuch as the question as to the 2062*l.* 10*s.* depended entirely upon the construction of the contract, and upon the question, whether the defendants, in that state of the record, had a right to introduce any new construction of the contract, or any construction beyond what was on the record; and, as that was purely a question of law, he would disembarrass the case from it altogether, by reserving it, — for the defendants, in case they could successfully contend that the construction of the contracts, taken altogether, entitled them to make that reduction, — for the plaintiff, in case he could contend, that whatever the true construction might be, the state of the record precluded that question from being agitated (*b*); and that all the jury had to enter into was, the question which had been chiefly agitated, — whether or not they should give, in addition to the sum which the annual instalments of interest amounted to, interest on those instalments from the time when they respectively became due. His Lordship said that he wished to state distinctly what he conceived to be the law upon the subject, because, although he had an opinion upon the construction of the act of parliament, yet, in order to save further expense to the parties, he was disposed, after

(*a*) It is here admitted, for the purpose of the argument, that had the delay of payment rested solely with the defendants, they would have been liable to the payment of the interest claimed. The position of the plaintiff appears therefore to be not unlike that of the holder of a bill of exchange, who having brought an action in which he is improperly nonsuited, should be told, upon obtaining a verdict upon a new trial, that the running of interest ought to be suspended during the period intervening between the nonsuit and the verdict, the delay having been occasioned by the mistake of the judge.

(*b*) *Post*, 313.

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stating that opinion, to leave to the jury the question, what they would do in case the act gave them the full jurisdiction which the plaintiff contended they had. His Lordship added, that he was very much inclined to agree with the construction put by the defendants' counsel on this act, that it did not apply to a case like the present, where the contract itself was a contract for payment of interest, and that the act related to such contracts, as upon the face of them, if an action were brought for the principal, did not authorise the jury, generally speaking, to give interest in the shape of damages, and that it excepted all such contracts as, from their nature, warranted a jury in giving interest before the act passed. That this was a contract for the payment of 550,000*l.*, and for the payment of interest on the half yearly instalments, and that, therefore, the contract, upon which the action was brought, though now limited to the interest, was a contract bearing interest upon the face of it; and that he was therefore disposed to think, that it was not a contract within the act. But that to save the expense of another trial, his Lordship proposed to the jury to say what, if the act gave them authority, they would under all the circumstances be disposed to do; that the act of parliament does not say that the jury shall give interest in any case, but only that "the jury, if they shall think fit," &c. So that the question which the jury would have to try was, whether they would think fit in that case, to allow any interest, and what interest, if any, they would allow; but in that view they must look at the circumstances of the case. That there was no example in a court of law, upon a mere contract of principal and interest, of compound interest being given in the shape of damages or loss; that in merchants' accounts, where an annual account is made out upon accounts current, and a balance struck comprising both principal and interest due up

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to a certain day, and that balance is carried to a new account bearing interest, compound interest is given in effect; but that the rule has never been, that upon the *last* balance, in which there is no new account and no new transaction, however long it may be before the action is brought to recover the balance, the plaintiff can recover more than the principal; and the jury will not give interest, still less compound interest upon the balance: this is the rule. That it was also the general rule of courts of equity not to give compound interest, but that there were certain exceptions; that a court of equity occasionally gave compound interest, where it found that the party had been making use, improperly or fraudulently, of the money, for his own benefit, and making a profit of it. That in such cases, courts of equity sometimes directed the Master (who is to be the accountant of the court), to state the account with rests from year to year, in the same manner as a merchant makes out his accounts, and that in that way, compound interest is given; that is, upon the principle of the party's keeping, by fraud, the money of another in his own hands, for his own benefit and his own profit. That there may be one or two other excepted cases, but that the general rule is, that upon simple interest you do not give the addition of compound interest. That the jury would say, whether in the case before them they would depart from the general rule, and exercise the discretion given them by the act; that the jury ought not to make an imputation of improper conduct either on the plaintiff or on the defendants. That the jury could not try the merits of the issue in Chancery, and could not have before them the facts, to determine which was right and which was wrong. That every man who makes a contract, if he think he is aggrieved and ought not to perform it, has a right to apply to a court of equity for the dissolution of it, and to absolve himself

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from the performance of it; and that the other party has an equal right to contradict that view, and to carry it to the last tribunal before he gives up his right to insist on the contract. That in many cases both parties do that with the utmost integrity of intention and great propriety of conduct. That all the interest on this contract had been paid up to *April* 1833: That a decree was made in the Court of Exchequer, upon a bill filed by the now defendants, to set aside the contract: That the decree being made and an injunction having been issued (which the decree, in effect, confirmed), to prevent the now plaintiff from proceeding at law, the parties stood in this position, — that from *November* 1832, when the decree was made, until *April* 1838, when it was reversed, the now plaintiff could not proceed at law to recover these instalments, and the defendants had a clear right at law to insist upon not paying them. That it would have been absurd, when the defendants had got a decree in their favour to absolve them from the performance of the contract at law, for them to go on and tender instalments half-yearly. That they *could* not have done it. That it would have been preposterous. That the plaintiff could not, in a court of law, have recovered the instalments, because he was restrained by the decree, which put an end to his right altogether. That during the period when these eleven instalments became due, neither party was guilty of any wrong towards the other. That it could not be said that the defendants were making use of the plaintiff's money, when the Court of Exchequer had determined that it was *not* the plaintiff's money, and that the defendants had a right to keep it. That the defendants had authority at law not to pay these instalments. That in *April* 1838 the House of Lords dismissed the bill with costs, and remitted the plaintiff to all the rights he would have had if a decree had been made in his favour in the Court of Exchequer.

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in November 1832. That if the decree *had* been made in his favour at that time, the instalments would probably have been paid; but that the question was, whether the plaintiff stood exactly in the same position, with respect to the compound interest. That the jurisdiction which the jury had, and which they possessed even before the statute, was, that of giving interest in the shape of damages; and that, even before the statute, there had been cases where juries had, with great propriety, given interest in the shape of damages upon a breach of contract, though the contract did not bear interest. His Lordship then adverted to the case of *Lord Dudley* v. *Robins*, and added that here, by the award of a court of competent jurisdiction, the defendants were *entitled* to detain this money: that this award had afterwards been reversed by another court, and the defendants were therefore bound to pay it. That the jury had jurisdiction to give interest in the shape of damages, if they thought fit; but that the question was, whether the defendants had been the cause of the damage. That the real cause had been a decree in the court of Exchequer. That if the jury could bring themselves to think, or to conceive, in what way the defendants ought to have acted, after the decree in their favour, different from that in which they had acted, and that they had caused, by any conduct of theirs, since that time, any damage to the plaintiff, by retaining these instalments, then they would have a right to give, if they thought fit, compound interest in the shape of damages; but that if they thought that the defendants had done the plaintiff no wrong, and that, under the circumstances, they were fully entitled to abstain from paying him the money whilst the case was pending in the House of Lords (and which they had a right to hope might be decided in their favour, as much as he had a right to hope that it might be decided in

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his favour), then it was for the jury to say, whether they could attach to the defendants any damages for any wrong done to him beyond the mere sums of money they were bound to pay over as half-yearly instalments That supposing both parties to have acted *bonâ fide*, with the best intention, it was for the jury to say whether, in such a case, they, in their discretion, thought it fit to give compound interest in the shape of damages whether, when a man owes a sum of money, which he ought to pay on a specific day, but he has got a judgment of a court of law, which says that he is *not* to pay it, whether, from the time he has judgment in his favour, he ought to pay interest in the shape of damages, if a superior court afterwards reverses the judgment: that, this was the whole question. That it has been argued, with great propriety, that the defendants had the money, and also the estate. That, if the jury had specific proof before them that the estate was yielding a *profit* to the defendants, and that they were making use of this money in order to carry on a *beneficial trade*, it might, among other arguments, be a very cogent one to direct their judgment; but that they were not to take that as matter of conjecture, and act upon it. That it was true, that the defendants retained possession of the estate; but that it was equally true that the plaintiff might have had it back again if he had chosen to give up the contract; so that, under the circumstances, whilst he was contending for the benefit of the contract, and they were endeavouring to resist it, they could not get rid of the estate, because he would not take it back, and the court could not order him to take it back. That the defendants, therefore, had kept it *par force*. That unless the jury had some evidence that the defendants have made a profit of the estate, the *possession* of the estate could not be an ingredient which ought to enter into their judgment

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That it had been urged, that if the property had been an estate let out to tenants who paid half yearly rents, the party who possessed the estate might, probably with some certainty, have derived an advantage from that possession. But that here the subject matter of the contract was in the nature of a manufacture, a process for making iron, and whether the defendants lost or gained by it there was no evidence. That it could be no ingredient, therefore, in the judgment which the jury were to form, that the defendants had possession of the estate, and had been making a profit of it. That the jury were to consider, whether they would in this, a new case, give compound interest in the shape of damages; and, if they did, at what rate they would give it, because the act did not bind them to give 5 per cent.; the words of the act being, "interest *not exceeding* the current rate of interest:" that 5 per cent. had not been the usual rate of interest for the last seven or eight years.

His Lordship then requested the jury to say, whether, under the circumstances, supposing they had the power to do so, they would give compound interest, and, if they did, at what rate they would give it.

The jury, after consulting four minutes, gave the following verdict: — "The jury are of opinion that the plaintiff is not entitled to anything more than simple interest."

5th *Nov.* 1838.

In the following *Michaelmas* term Sir *W. Follett*, pursuant to the leave reserved, moved for a rule to shew cause why the verdict, taken formerly for the plaintiff, with 2063*l.* damages, should not be set aside, and a verdict entered for the defendants.

The defendants are not precluded by the mode in which the record is shaped, from introducing a con-

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dition which is to be found in one of the contracts upon which the plaintiff has declared, but which he has not thought proper to disclose by his declaration. (*a*)

By the second contract, as set out in the answer, the interest upon the 75,000*l.* was reduced from 5 to 4½ per cent. It is true, that the parties contemplated that the previous instalments and the interest would be paid at the appointed times. But for any default in making these payments, the plaintiff had the remedy in his own hands, as he was, by the terms of the contract, at liberty to sell and pay himself. The 75,000*l.* was to remain on mortgage at 4½ per cent., amongst other purposes for that of indemnifying the purchasers against any defect of title. Until the title was perfected, which it never has been, the arrangement for leaving the 75,000*l.* on mortgage could not be disturbed.

Rule to shew cause granted.

6th *Nov.* 1840.

On the following day *Wilde*, Serjt., moved for a new trial, on the ground of misdirection.

The Lord Chief Baron told the jury to throw out of their consideration every material fact which applied to the question of interest, and then to say whether it was a case in which they would give interest. One after the other, the Lord Chief Baron told the jury, in substance, to throw out of their consideration this fact, and to throw out of their consideration that fact, until he had thrown out of consideration every fact which was material, and then, certainly, what is called, left it to the jury. It is a principle in courts of equity, and indeed in all courts, that no party shall be injured by the acts of the court.

(*a*) *Clarke* v. *Gray*, 6 *East*, 564., 2 *Smith*, 622. And see *Anon. M.* 5. *Jac.* 1., *Godbolt*, 154.; *Power* v. *Waterhouse*, *Aleyn*, 5.; *Latham* v. *Rutley*, 2 *B. & C.* 20., 3 *D. & R.* 211.; *Swallow* v. *Beaumont*, 1 *Chitt. Rep.* 518.; *Icely* v. *Grew*, 6 *N. & M.* 467.; 1 *Wms. Saund.* 33. n. (2)

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In numerous instances the Court of Chancery gives interest upon matters, and upon occasions (requiring the payment of interest by parties who have been the means of preventing the payment of a demand), upon which, under other circumstances, no interest would be demandable. Where parties have obtained an injunction which has turned out to be unfounded, courts of equity have not unfrequently, in cases of mesne profits, and in cases of annuities and rents-charge, given interest, upon the ground that the party ought not to be injured by the granting of the injunction. The late statute authorises the jury to give interest where the sums sought to be recovered are certain, and payable on a day certain, and, after demand, even where not payable on a day certain. In the present case, the defendants after the execution of the third agreement, were liable, not for the principal sums constituting the purchase-money, but only for the half yearly sums, payable, at 5 per cent., on the principal sums. Even if the defendants had remained liable for these principal sums, the principal, and the interest expressly reserved by the contract, would have constituted two distinct debts. The rule is perfectly clear, that where interest is reserved by the contract, it forms a distinct debt from the principal, and recoverable as a distinct and independent debt. The authorities are numerous, but it will be sufficient at present to refer to one case, in which the doctrine is clearly and fully expressed in a judgment pronounced by a judge whose authority stands as high as that of any that could be named, Mr. Baron *Wood*, in *Dickenson* v. *Harrison* (*a*). Here, are certain sums agreed to be paid half-yearly, the parties not being liable for the principal sum, though, by paying that principal sum, they might relieve themselves from these

(*a*) 4 *Price*, 282.

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payments. (a) The act of 3 & 4 *W.* 4. *c.* 42. *s.* 28. wi be found to go the whole length of the present deman It is not imperative upon the jury to give interest und the statute in cases where, at common law, no intere was recoverable; but, for the purpose of leading the ju to a due exercise of the discretion with which they we invested, it was competent to the plaintiff to put befo them the fact that the injunction was substantially t act of the defendants, effected by the means of imposi upon the Court by a statement which turned out to without foundation. The bill was a bill filed for del which grew, upon speculation, into a charge of fra and if a man files a bill for delay, to keep money in pocket which he has contracted to pay over, and obta an injunction which is afterwards dissolved, it is the of the debtor preventing the creditor from availing hi self of his legal remedy. The discretion to be exe cised by the jury should be regulated by the facts whic are in evidence before them, by the circumstances und which the delay took place, and the injury suffered b the creditor; and though it is not necessary that th debtor should have particularly profited by his wrong yet if the circumstances of the case are such as to lea to the supposition that a profit has been made, the ca becomes still stronger. On the behalf of the plaintif it was therefore pressed before the jury that he ha been delayed in the receipt of these moneys, by pe sons in possession of his estate for eleven half yea by an injunction which turns out to be without foun ation. The first thing which the Lord Chief Baron to

(a) The defendants would not have incurred the liability to make the payments sought to be enforced in this action, if the instalments had been paid at the times appointed by the contracts; but no acts done by the defendants could have re lieved them from the payment of the nature, or in the form, interest, which, under the con tracts, accrued upon the instal ments *before* those instalment became payable.

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the jury was, that they must entirely dismiss from their minds all about the bill in equity; that they must take it for granted that the bill,—dismissed with costs,—had been filed *bonâ fide;* that every man had a right to appeal to a court of justice; and that the defendants had as much right to hope for success on their part as the plaintiff had on his; and that therefore the jury must entirely dismiss from their minds all about the delay; and, that as for the injunction, the defendants could not be answerable for that, because that was the act of the Court; and that, considering that the bill must be taken to be *bonâ fide*, and the injunction the act of the Court, it was for the jury to say whether the defendants had inflicted any injury upon the plaintiff. "What injury? The injury, if any, arose from the injunction, not from the defendants. You must impute no improper conduct. Your judgment must not be founded upon any imputation of improper conduct. The court granted the injunction; the plaintiff could not proceed at law (*a*) to recover the instalments: the defendant had a clear right at law to insist upon not paying them. That was their position." That is, when they had got an improper injunction, they might make use of it at law. That was the very substance of the plaintiff's complaint; but which the learned Judge turned into matter of excuse. "The plaintiff could not proceed at law (*a*) to recover the instalments; the defendants had a clear right at law (*b*) to insist on not paying them. That was their position. Would it not have been absurd, when the defendants had got a decree in their favour, to absolve them from the performance of the contract, to have gone on and paid the instalments half-yearly? They *could* not have done it; it would have

(*a*) *i. e.* could not without subjecting himself to the penal visitation of a court of equity; as the injunction would be no defence at law. *Vide antè*, 239. n.

(*b*) See the preceding note.

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been preposterous." When the jury have t a discretion whether parties who improperl process of the court, upon allegations whic to be unfounded, to delay a man in reco demand, it is most surprising that this ver duct should be turned into their justificatio should be put forward by the judge as a r the plaintiff ought not recover interest, and laid upon the court, and that the jury shou that a debt, shewn by the order of revers been honest and just, "it was absurd and ous to expect they would pay;" "and the plai not, at law (*a*), have recovered it, because h strained. In that position the parties stood time the injunction continued. Can it be sai defendants did any wrong to Mr. *Attwood?* therefore, stands thus: — by the award of competent jurisdiction, the defendants were retain the money." The defendants, in this s proceedings, do *not* stand as having been enti tain the money during that period; they st position of having been bound to pay it,— used the process of the court, — obtained u tions which turn out to be without found having used that process, to deprive plaintiff half-yearly payments of 8250*l.* Then th judge says, "You must suppose that both pa *bonâ fide;* the *real* cause of the injury has decree of the Court of Exchequer. If you yourselves to conceive in what way the ought to have acted after the decree of the Exchequer, different from that in which acted, and that others have, by their condu any damage to Mr. *Attwood* by retaining th then you may give compound (*b*) interest. If

(*a*) *Suprà*, 308. (*a*)

(*b*) *Vide suprà*, *infrà*, 322. (*d*)

nder the circumstances, they were fully entitled to abain from paying him the money, in that case how can ou say he has done them any injury?"

That the delay of the plaintiff was caused by an inunction obtained upon a charge of fraud and misrepreentation, which a court of competent jurisdiction has ltimately held not to have been sustained, was a fact roved at the trial. To tell the jury, therefore, that hey must take it that the suit was *bonâ fide*, and to tell hem that the defendants were entitled to retain the money, &c., was, it is submitted, clearly erroneous.

Then with regard to the possession of the estate by the defendants, the Lord Chief Baron says, "That is no ground, undoubtedly, because you have no evidence that they made a profit of the estate." If it can be proved that a man is in possession of an estate, yielding rent and yielding produce, it is very reasonable to suppose that profit has been made, or if used properly might have been made. But the Lord Chief Baron went further. He said, "With respect to the possession of the estate, Mr. *Attwood* can make no ground of that, for, you observe, they wanted to get rid of the estate. The bill was filed to make him take it back again. If, therefore, he had chosen to take his estate, he might have done it." (*a*) His Lordship forgot the refunding of between 200,000*l.* and 300,000*l.* (*b*) "And therefore, you see, gentlemen, it is not that they wished to keep the estate, for they offered it to Mr. *Attwood* by their bill." His Lordship forgot that if an estate is purchased at a time

(*a*) This observation seems to be an answer to an argument founded upon the profit which the plaintiff could have made of the estate if he had not parted with the possession, rather than to one founded upon profit supposed to have been made by the defendants.

(*b*) And *quære*: whether, if the plaintiff had elected to take back his estate, he could have done so without paying the costs of the suit in the Exchequer, (in addition to the 225,000*l.* and interest which he had received,) and also interest upon the 225,000*l.*, and upon what he had received as interest.

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of great speculation, and when iron is at 10*l.* or 11*l.* pe ton, and those who have entered into the speculatior wait until iron is at 4*l.* or 5*l.* per ton, and offer to re turn the estate back, at a time when there are no buyer you do not *quite* reinstate the parties. You take th estate when market is full of buyers, and money flus You wait till a time of depression, and then you off the estate back again. His lordship put it to the ju that there was no proof of actual profit made by t estate, and next, that this was not a subject fairly to considered, because, by their bill they had offered give back the estate. Certainly the plaintiff had case to offer to the jury to induce them, in the exerc of their discretion, to give him interest, if the defenda were not the means of delaying the plaintiff in recov ing his money, — if the unfounded suit and the p session of this estate, which, in his hands, produc great value, and which may reasonably be suppos from the price given (600,000*l.*) (*a*), to have produc some value in the hands of the defendants, particula as that price had not been paid, did not place him in t position of having been wrongfully delayed by the a of the defendants. If these considerations were to thrown out of the case, it must be admitted that the ju exercised a sound discretion in refusing to give inter upon the sums withheld. But the bill filed by the d fendants, and the injunction obtained by them, were, i submitted, legitimate circumstances to be taken in consideration, for the purpose of ascertaining wheth the plaintiff had sustained an injury by the detenti of his money; and, still more, in ascertaining wheth

(*a*) In an action for use and occupation, or for *mesne* profits, evidence is given of the annual value of the property whilst occupied by the defendant; but no inquiry is made as to the *profit* resulting from the cultivation, or as to the proper being cultivated at all. He the defendants were however taking that which was no merely the *produce* of the estate, but its very *entrails*, — the estate itself.

the defendants were not the authors and the means of that injury. The Lord Chief Baron, however, told the jury that they must take it to be done *bonâ fide*, and must throw out of their consideration the bill in equity; and stated, that it was the act of the court which occasioned the delay, and put to the jury this fact (of which they could not judge), that the defendant had offered to give back the estate. These were not the ordinary remarks by a judge upon the facts of the case in summing up, but were directions calculated evidently to mislead the jury, and to withdraw very material circumstances from their attention.

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TINDAL C. J. Take a rule to shew cause, and let it come on at the same time with the other.

Wilde, Solicitor-General, now shewed cause against Sir *W. Follett*'s rule. The sums which had been paid into the Court of Exchequer under the first order for an injunction, having, after the decision of the appeal in the House of Lords, been paid out of court to the plaintiff, this action was brought for the remaining interest. The defendants insist that they are not liable for interest beyond the sum of 87,312*l.* 10*s.*, and, having paid that sum into court, they require the verdict to be entered in their favour. The defendants, in paying money into court, have deducted 2062*l.* 10*s.* out of the sum of 89,375*l.* claimed by the plaintiff; and they insist that they are entitled to make this deduction by reason of a proviso contained in the second contract, not set out on the record, that proviso being omitted in the declaration, because it was considered by the plaintiff to be, under the circumstances which have occurred, inoperative. The breaches which are assigned in the declaration apply, not to the principal moneys, but to interest at

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5 per cent.; and the sums constituting the 89,375*l.* sought to be recovered, are not claimed by way of damages for the nonpayment of other sums, but as sums specifically contracted to be paid.

The stipulation contained in the proviso was applicable, not to 75,000*l.*, an undivided part of 325,000*l.* but to 75,000*l.* as the remnant of the purchase money. Supposing, however, the former to be the effect of the proviso, evidence of a contract to pay 4½ per cent. would be repugnant to a declaration alleging a liability to pay 5 per cent., which declaration the defendants have affirmed, by merely pleading payment of money into court. *Clarke* v. *Gray* was cited by the defendants, to shew that they were not concluded by the payment of money into court. In *Yate* v. *Willan* (*a*), the defendants paid 5*l.* into court; and it was held, that the defendants could not set up a restriction, as to the amount of damages, which was not stated in the declaration. In *Clarke* v. *Gray*, relied upon by the defendants, for the purpose of shewing that they are not concluded by the payment of money into court, it was held, that a restriction as to the amount of damages need not be set out in the declaration, and that the omission of a clause, merely regulating the amount of damages, did not amount to a variance. Here, the question arises not upon the mode of assessing the damages, but upon an agreement by which the defendants contract to pay a stipulated sum. In *Clarke* v. *Gray*, the provision regulating the assessment of damages was a matter subsequent to the contract, and which could only operate after the contract had been established. Here, the defendants are claiming the very sum contracted to be paid; and the defendants' case is, that, taking the three agreements together, there was no promise to pay more

(*a*) 2 *East*, 128.

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than 4½ per cent. on the 75,000*l.*; and they cannot succeed in the present motion, except by shewing that the agreement was, not for 5 per cent., as declared upon, but for 4½ per cent. The ground of the judgment in *Clarke* v. *Gray*, (whether the view there taken of the facts stated in the declaration was right or not,) was, that the provision limiting the liability of the carrier to 5*l.* formed no part of the contract; and that, consequently, its being omitted in the declaration, constituted no variance in the statement of the contract.

Here, there can be no doubt with regard to the effect of the declaration.

In the anonymous case in *Godbolt* (*a*), a man, in consideration of marriage, promised to do three several things. For the non-performance of one of these, the promisee brought an action, alleging that the defendant, in consideration of marriage, promised him to perform that thing without mentioning the two other things. The defendant pleaded non assumpsit, *modo et formâ*; and the opinion of the Court was, that it was a good issue; for, the contract being entire, if it be not a good plea (*b*), the defendant might be charged for the several things, that is, he might be subject to the three several actions, which cannot be, being but one contract by word: but it is otherwise of several contracts, in writing. Here, the promise is sought to be varied in evidence by the defendants. Were the construction contended for by the defendants the true one, the objection is not open to them upon this record; they must wait till they are sued for another half year. The defendants are in the same situation as if there had been a judgment by default upon this declaration, and a reference to the Master to compute the interest. That which the plaintiff now claims, he might have taken, without evidence, upon the judgment by default.

(*a*) P. 154.

(*b*) *i.e.* a plea warranted by the state of the facts.

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Then with respect to the merits of the object the money remains due on the agreement, and no the mortgage which was contemplated. There i analogy between the rights of an unpaid vendor, those of a mortgagee with power of sale.

Talfourd, Serjt., on the same side. The defend wish to treat the provision for reducing the intere 4½ per cent., as merely an addition to the contract w they admit by their plea. For the plaintiff it is, l ever, submitted, that this is an attempt to vary, by dence, the contract admitted on the record. A cont to pay 5 per cent. must be essentially different fro contract to pay 4½.

It lies upon the defendants to shew that the case arisen upon which the interest was to be reduced: t are not entitled to claim a reduction of interest with proving that a mortgage has been executed.

R. V. Richards, on the same side. It is too late to contend that the contract is not admitted by the p ment of money into court. [*Tindal* C. J. Where contract is special.]

Sir *W. Follett*, in support of his rule. Two po have been raised for the consideration of the Co First, whether, in point of law, the plaintiff is enti to recover the 2062*l.* 10*s.* upon the true constructio these three contracts; and, secondly, whether suppo the defendants were not bound to pay this sum ei at law or in equity, they are shut out from their def by the payment of money into court. It is necessar call the attention of the Court to the agreements, to the form of the declaration. In the declaration agreements are set out in the words of the parties, in doing that, a part of the second agreement is omit That omission was supplied for the purpose of shev

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the extent of damages. [*Tindal* C. J. The declaration contains mutual promises (*a*) on the agreements.] The interest is, by the agreement, to be reckoned from the *1st October* 1825 until the *day of payment*, not until payment. [*Coltman* J. You contend that that means the day *appointed* for payment.] The contract is to pay on a particular day. After the day of payment, what interest the plaintiff seeks to recover is not claimed on the contract, but by way of damages. The mode in which the defendants were to pay, is material. Three instalments of 100,000*l.* each were to be paid on particular days with interest; 75,000*l.* was to remain on mortgage. In case of default in payment of the instalments, the plaintiff had power to sell. The defendants were bound to pay interest only so long as they remained in possession of the estate, not if the plaintiff sold under the power. [*Erskine* J. They were to pay interest as long as they continued in possession of the hereditaments and premises, *or any part thereof.*] The trustees might sell the whole. The distinction between interest made payable on particular days specified in the contract, is distinctly laid down in a note to the last edition of *Wms. Saunders*, where after noticing the decision in *Dickenson* v. *Harrison* (*b*), that the principal and interest in a mortgage debt are separable, the editor say, "The usual covenant in a mortgage deed is, to pay the principal and interest on a certain day, but there is no covenant to pay interest after that day (*c*): Therefore, in debt on such a deed, the interest, *subsequent to the day of default*, must not be claimed as part of the

(*a*) The effect of the insertion of mutual promises seems to be, to fix the reciprocal subjects of those promises as that which constitutes the contract between the parties. It seems difficult to reconcile the admission of the mutual promises with the view presented on the part of the defendants.

(*b*) 4 *Price*, 282.

(*c*) Here the covenant is, to pay interest upon the instalments *until the day of payment.*

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debt, but as *damages* for the detention of the debt." In *Atkinson* v. *Jones* (*b*), *Littledale* J. says, "In common course of things, the proviso in a mortg is, for payment on a given day, which day is here p poned for several years from the execution of the mo gage. The interest up to that day is all that is m payable by the deed of mortgage. If an action of d were brought on the deed, the declaration would only for the amount of principal and interest due u that day by the terms of the proviso. Any thing wh was recovered besides this, would be in the shape damages for the detention: the breach could be assig only for non-payment up to and on that day." here, after the day on which the last instalment w made payable, the defendants would be liable for i terest, not, as before, upon the contract, but in t nature of damages, to be calculated at the same rate interest which the parties had contracted to pay for t period, during which, by the agreement of the parties, t instalments were to remain unpaid. The defendants sa "Although true it is, that we agreed to pay as stat in the declaration; true, that we entered into the secon agreement; true, that we entered into the third agre ment; yet, the plaintiff is not entitled to recover mo than the sum brought into court." For the plaintiff is objected, that we have no right to look at the subs quent part of the contract. But if the defendants h pleaded *non assumpsit*, they could not have made out variance by producing that part of the contract; becau the mode of estimating the damages sustained by t breach of the contract, is no part of the contract itse The defendants, by their plea, admit the special contra and every thing in the declaration which was necessa to entitle the plaintiff to recover the money brou

(*a*) 1 *Wms. Saund.* 201 *a.* (*n*) (*b*) 2 *Ad. & El.* 439.

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court. It is not contended, that the defendants can, under the present plea, set up a different contract. In *Yate* v. *Willan*, Lord *Kenyon* says (*a*), "The payment of money into court, on a special count, admits the contract as there laid, but leaves the amount of the damages, incurred by the breach of it, open to dispute." In *Clarke* v. *Gray* (*b*), it was held, to be necessary to set out the whole of the consideration of the promise declared on, but not the whole of the contract. The plea which the defendants have pleaded, does not therefore admit that the declaration has stated the whole of the contract. The contract is, to pay on the 15th *April*, 1826, with interest from the 1st *October*, 1825. The *debt* to be recovered would be the interest up to that day; the subsequent interest would be merely damages. Even the debt was a contingent debt; for, if the defendants had been kept out of possession, they would not not have been liable for interest. Then it was for the jury (subject to the question, whether this is a case within the statute,) to say, whether, under the circumstances of the particular case, they would give interest. And it is observable, that the plaintiff, in case of non-payment, had not only the power of selling but also that of becoming himself the purchaser, and thus retaining the estate. It is said, that the question of reducing the interest to 4½ per cent., does not arise, until it is shewn that the instalments were regularly paid. That is not so; for, suppose the estate to have been sold to pay the instalments, the plaintiffs would have been entitled to take 5 per cent. upon the instalment of 100,000*l.*, and 50,000*l.*; but 4½ only, upon the 75,000*l.* By the arrangement made as to the 75,000*l.*, the parties have shewn what is the rate of interest which ought to be recovered.

(*a*) 2 *East*, 132. (*b*) 6 *East*, 564.

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Whateley, on the same side. Great doubts appe to have existed formerly as to the effect of the pa ment of money into court, *Gutteridge* v. *Smith* (*Giles* v. *Hartis* (*b*), *Andrews* v. *Palsgrave* (*c*), *Randal Lynch* (*d*), *Cox* v. *Parry*. (*e*) In *Mellish* v. *Allnut* (it was held, that payment of money into court u a count, on a policy of insurance, though an adm sion of the contract, does not preclude the defend from disputing the liability beyond such paym Lord *Ellenborough* there says, "If the rule were out in terms, it would only be *evidence*, and the j should have drawn the conclusion." In *Dyer* v. *As ton* (*h*), the result of the decisions upon this point thus summed up. "The effect of all these cases up this subject is, that the payment of money into cou admits every thing which the plaintiff would be oblig to prove, in order to recover that money."

Talbot, on the same side. In *Reid* v. *Dickons* (*i*), was held, that the payment of money into court upon count on a promissory note payable by instalments, admitted the making of the note, and that money to the extent of the sum paid in, remained due; but that it did not admit the non-payment of those instalments to which the statute of limitations was pleaded. In the case, *Parke* J. says, "The payment of money int court admits the contract as alleged, and a right recover 110*l*., but, beyond that sum, every defence open. It is much the same thing, as if the defend had admitted the contract, and stated, at the same ti that no more than 110*l*. 10*s*. 6*d*. was due upon it. *Patteson* J. says, in *Cox* v. *Parry* (*k*), "It was dec

(*a*) 2 *H. Bla.* 374.
(*b*) 1 *Lord Raym.* 254.
(*c*) 9 *East*, 325.
(*d*) 2 *Campb.* 357.
(*e*) 1 *T. R.* 464.
(*g*) 2 *M. & Selw.* 106
(*h*) 1 *B. & C.* 3.; 2 *D. &* & *M.* 369.
(*i*) 5 *B. & Ad.* 499.
(*k*) 1 *T. R.* 464.

that payment of money into court is an acknowledgment by the defendant, of the contract, and that the plaintiff is entitled to recover the sum so paid; but that it did not preclude him from taking any objection limiting the operation of the contract, in order to bar the plaintiff from recovering more than had been paid into court." So in *Long* v. *Greville.* (*a*) In *Watkins* v. *Morgan* (*b*), which was an action of debt, upon a covenant to pay 270*l.* with lawful interest for the same from the 15th of *June*, on the 15th of *December*, laying the damages at 10*l.*; it was held by *Littledale* J. at *Nisi Prius*, that, inasmuch as the contract in the deed was only to pay 270*l.* with six months' interest, which would be 276*l.* 15*s.*, all the rest was damages for the detention, and that the plaintiff having laid those damages at 10*l.*, could not recover more. On an application being made to that learned Judge, to amend the declaration as to the statement of damages, his Lordship refused to do it on the ground that it was not any variance between the deed and declaration. In *Dickenson* v. *Harrison* (*c*), it was held, that interest is not a part of the debt secured by mortgage, but rather sounds in damages. (*d*) In *Higgins* v. *Sargent* (*e*) it was held, that interest was not recoverable upon a sum of money covenanted to be paid six months after due proof of the death of *A.* In *Hollis* v. *Palmer* (*g*), *Tindal* C. J. says, "in ordinary cases, interest has always been deemed a mere accessory of the loan, and when the demand for the principal is

(*a*) 3 *B. & C.* 10.; 4 *D. & R.* 632.

(*b*) 6 *Carr. & P.* 661.

(*c*) 4 *Price*, 282.

(*d*) The marginal note, containing this position, appears to be warranted by what fell from *Graham* B., by whom this doctrine was laid down, even with reference to an *express* covenant to pay interest on a day certain; but this appears to be contrary to all the cases.

(*e*) 2 *B. & C.* 348., 3 *D. & R.* 613. And see *Page* v. *Newman*, 9 *B. & C.* 378.; 4 *Mann. & R.* 305.

(*g*) 2 *New Cases*, 713.

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barred, the accessories fall along with it." (*a*) In *Ha* *son* v. *Douglas* (*b*), where the defendant in an action u a mutual insurance policy paid money into court, it considered, that it was open to the defendant to sh that, by the rules of the society, the money due on a was payable by instalments. The declaration in case does not profess to set out the whole of the agr ments. It states, that it was agreed, "amongst ot things;" but the mutual promises are made in respect the *whole* of the agreements. (*c*)

Sir *W. Follett* now shewed cause against the r for a new trial. This rule depends upon the constr tion of the twenty-eighth section of 3 & 4 *W.* 4. *c.* 4 which leaves the question of interest in the discretion the jury. The whole of the evidence was plac by the learned judge before the jury, with a vi to the exercise of that discretion. [*Wilde*, S. G., p posed that the direction to the jury should be tak as it stood upon the short-hand writer's notes; which Sir *W. Follett* assented. *Bosanquet* J. T proper course is to read the judge's note of his summi up.] The plaintiff claims interest upon the interest it became due. The bill was filed against the plain in 1826. The plaintiff put in his first answer in 18 After this came the orders for an injunction. At the t it was urged, on the part of the plaintiff, that, because orders for an injunction prevented him from proceedi the defendants were to be punished with interest. I too much to assume that this bill in the Exchequer w filed for delay. [Lord *Abinger* said to the jury: Y have nothing here but the bill and answer, and no

(*a*) 2 *New Cases*, 717. And see *Dixon* v. *Parkes*, 1 *Esp. N. P. C.* 110.; *S. C.* 5 *Wentw. Plead.* 510. 516.; *Hellier* v. *Franklin*, 1 *Stark. N. P.* 291.

(*b*) 3 *A. & E.* 396.; 5 *M.* 180.

(*c*) *Vide suprà*, 316.

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ference ought to be drawn either one way or the other. There is nothing to shew that the bill was not filed *bonâ fide*. The learned judge certainly commented upon the evidence; but mere comments upon evidence cannot furnish any ground for a motion for misdirection. The late statute does not give interest in the case of a judgment reversed. The sole object of the enactment appears to have been, to enable juries to give interest where they had not such power before. For the defendants, *Dickinson* v. *Harrison* was cited; and, according to the argument which the plaintiff founds on that case, the plaintiff might recover interest upon the unpaid instalments of the purchase money, although the interest *reserved* in respect of such instalments had been actually paid by the defendants. Then it was said that courts of equity allow interest upon annuities. But, except under special circumstances, that is not so. (*a*) If the plaintiff had sold the estate under the power of sale given by the second agreement, he could have sold only for the principal and *simple* interest. But it is said that the jury may give interest, if they think fit. Unless they can give it under the 3 & 4 *W.* 4. *c.* 42. they clearly cannot. (*b*) These sums, whatever they are called, are *interest* (*c*) on the purchase-money, and therefore interest thereon is *compound* interest. (*d*) [*Wilde* S. G. If the act of parliament is against me, there is an end of that part of the case. (*b*)]

(*a*) And see *Creuze* v. *Hunter*, 2 *Ves.* jun. 157.; *Anderson* v. *Dwyer*, 2 *Scho.* & *Lefr.* 301. *Secùs*, where the annuitant has been prevented from exercising his legal remedies by injunction; *O'Donnell* v. *Browne*, 1 *Ball* & *B.* 262.; *Pulteney* v. *Warren*, 6 *Ves.* 73. In which case the annuitant is entitled to interest from the filing of the bill; *Morgan* v. *Morgan*, 2 *Dick.* 643.; or, at least, from the granting of the injunction. And see *Page* v. *Newman*, 9 *B.* & *C.* 378., 4 *M.* & *Ryl.* 305.

(*b*) *Vide suprà*, 279. (*a*)

(*c*) *Vide suprà*, 281. n.

(*d*) *Vide suprà*, 296. (*b*)

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Wilde S. G., in support of the rule for a new tr In *Beete* v. *Bidgood* (*a*) an estate in *Demerara* was s for 16,000*l.*, the payment to be made by seven pro sory notes, falling due, on the 1st of *July* in 1822, and six following years, payable, with interest, at six cent. In an action brought upon one of these note was objected that the reservation of *interest* at six cent. was remaining. Upon a special case being served and argued, the court held the payments reser under the name of interest were, in substance, parts the purchase-money. Lord *Tenterden* says (*b*), "T parties have calculated the price, partly, in what th considered the value in present money, partly in mon to be paid at a future day. They have chosen to c it interest, which creates the whole difficulty. If th had said 'payable by instalments,' there would ha been no doubt." *Littledale* J. says, "The plaintiff, effect, said, if you can pay me 16,000*l.* down, you sh have the estate at that price. The purchaser says, n but I will pay you by instalments; upon which t seller says, then you shall pay me at the rate of six p cent. That they considered a reasonable rate. T doubt is raised merely by the use of the word 'i terest.'" (*c*) [*Tindal* C. J. That decision was qu right.] The third agreement, by relieving the defen ants from personal responsibility as to the princi instalments, and leaving them both for the seconds instalments, reserved as interest, severed the two debt and an action of debt might have been brought for th which was so reserved as interest; *Dickenson* v. *Har son.* (*d*) It is true that in *Seaman* v. *Dee* (*e*), Lord *Hi* was of opinion that no action of debt lay for interest

(*a*) 1 *Mann. & R.* 143., shortly reported, 7 *B. & C.* 453.

(*b*) 1 *Mann. & Ryl.* 155.

(*c*) *Ibid.*

(*d*) 4 *Price*, 282.

(*e*) 1 *Ventris*, 198.

money, though specially reserved by deed. (a) But that case is overruled by *Herries* v. *Jamieson* (b), *Verney* v. *Iddings* (c), *Doran* v. *O'Reilly*. (d) In *Higgins* v. *Sargent* (e) there was no day of payment, the money being payable at one month after an uncertain event, the death of *A*. The cases as to compound interest are collected in an important note to *Sackett* v. *Bagwell*. (g) A certain day does not, however, mean a day named, but a certain time. Here it was payable at the expiration of every six months after the 1st of *October* 1825. The third agreement adopts the half-yearly payments appointed by the first agreement. The interest which would accrue due before 15th of *April* 1827, when the last instalment was payable, would be interest recovered by the contract; that which accrued since that time would be recoverable as damages only. It may, therefore, be admitted that but for the statute (h) the plaintiff would not be entitled to the interest which he now claims. (e) It was a qualified right, subject to the discretion of the jury, that discretion to be exercised, as in all other cases, under the superintendence of the court. By the course which has been taken the plaintiff is deprived of his bill of exceptions. It is submitted that this is a clear case of misdirection. The defendant's bill, after delaying the plaintiff nine years, was dismissed with costs. The jury

(a) By 13 *Eliz. c.* 8., which gives the treble forfeiture where more than the statutory maximum of interest is reserved, the lender is to forfeit the *simple interest* if he take any thing under that amount, all usury, *i. e.* interest, being deemed unlawful, sect. 5. This section, which has never been formally repealed, had probably not become obsolete in Lord *Hale*'s time; and it would have been absurd to allow an action to be brought for that which, even if paid without action, the receiver would, under 18 *El. c.* 8. *s.* 5., have been bound to refund. And see 1 *Mann. & Ryl.* 207. (a)

(b) 5 *T. R.* 553.

(c) 2 *Chitt. Rep.* 234.

(d) 5 *Dow, Parl. C.* 133.

(e) 2 *B. & C.* 348., 3 *D. & R.* 613. And see 4 *Mann. & R.* 307. (a), 309. (b)

(g) 4 *Maddocks*, 69.

(h) *Suprà*, 294.

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were told that they were not to try the equity suit, a the ultimate and the intermediate decision were p sented to them as entitled to equal weight; and tha ought not to be assumed that the defendants w guilty of any wrong towards the plaintiff, because t ultimately failed in this suit in which they had tied his hands for nine years. In *Pulteney* v. *Warren* Lord *Eldon* C. says, "If there be a principle u which courts of justice ought to act without scrupl is this: to relieve parties against that injunction oc sioned by its own acts or oversights *at the instance the party against* whom the relief is sought." In *Bo* v. *Hopkins* (*b*), Lord *Redesdale* C. says, "Nothing better established in courts of equity than that where title exists at law and in conscience, and the effectu assertion of it at law is unconscientiously obstructe relief should be given in equity." In *Grant* v. *Grant* (*c* it was held that in a court of equity, a debt received b bond may be carried beyond the penalty of the bond, the debtor has, by injunction, restrained the credito from proceeding at law, and there has been no miscon duct on the part of the creditor. In that case Lor *Lyndhurst* C. stated "that in his opinion the plaintiff' demand was not to be limited by the amount of the pe nalty of the bond; for he had always considered, on th authority of *Duval* v. *Terry* (*d*), that a party who had bee restrained from proceeding at law, while the debt w *under* the penalty, had a right, in a court of equity, to pri cipal and interest beyond the penalty of the bond." (*e*) I a subsequent part of the case his Lordship says (*g*), "wi respect to the general jurisdiction, I entertain no doul

(*a*) 2 *Sch. & Lefr.* 413.
(*b*) *Ib.* 429.
(*c*) 3 *Russell*, 607.; *S. C.* 3 *Sim.* 340.
(*d*) *Show. P. C.* 15.
(*e*) 3 *Russ.* 607.
(*g*) *Ib.* 609.

whatever, that if a person indebted in a sum of money by bond files his bill for an injunction stating that he is entitled, by reason of equitable circumstances, to be relieved from the obligation which presses him at law, and there is no neglect or default on the part of the defendant, this court has a right to consider the bond creditor as submitting to do equity, when he asks equity; and whatever abstruse and delicate reasoning there may be, as to whether the excess of the debt beyond the penalty, is a specialty debt or a simple contract debt, this court will find a way to give execution for the difference. On the other hand, if it were the creditor's own fault that he had not payment of his debt sooner, it would not be competent for him to take the benefit of the same rule."

In *O'Donnell* v. *Brown* (*a*), it was held that an annuitant, prevented from resorting to his legal remedies by an injunction, was entitled to interest upon the arrears of the annuity against the party who had obtained the injunction; so in *Mayor* v. *Morgan.* (*b*) The plaintiff complains of a gross misapplication of the principle, that a party is not to be injured by the act of the court. The true mode of giving effect to that principle as between these parties, would be to take care that the plaintiff should not be placed in a worse situation with respect to the enforcing of his rights than he would have been in, if his legal remedies had not been improperly interrupted. The struggle here on the part of the defendants is, that they may profit greatly by the mistake of the court, and that at the expense of the plaintiff, who being now shewn to have been throughout in the right, is called upon to suffer for the benefit of those parties at whose instance the wrong was inflicted. Whenever a party is prevented by proceedings which

(*a*) 1 *Ball & Beatt.* 262. (*b*) 2 *Dickens*, 643.

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turn out to be unfounded, from asserting his right, he should be remitted to his rights. The question of interest was for the discretion of the jury, but nothing was left to their discretion. Must it be shewn that persons in the possession of valuable property have actually made a profit from that property? (*a*) The plaintiff does not object to any observation of a general nature which the learned judge may have thought it right to make, with respect to the disregard of popular lessees and the nature of compound interest. But the observations of the learned judge went to absolve them from the charge of improprieties of conduct, and to relieve them from the consequences of that conduct. It was impropriety of conduct in the sense applicable to the case. The merits of the case had been tried, and the judgment was before the court, yet the jury are told, that they cannot decide what party was right and what was wrong. In the sense of right and wrong, as applicable to this case, the point was already decided. The decree of the House of Lords established that the plaintiff had been delayed without cause. The expression "improper conduct," as used by the learned judge, must have misled the jury. He meant them to understand, that the defendants had a right to keep the money, — that they had a legal and moral excuse for not paying. The jury were told that it would have been preposterous; and that the plaintiff could not have recovered these instalments, because he was restrained by the decree, *which put an end* to his right altogether. It was also a misdirection to advise the jury not to find upon the circumstances of the defendant's having had the use of this property during the whole period in respect of which interest is never claimed. The point

(*a*) Supposing the liability to depend upon actual profit, if 20 per cent. were gained one year and nothing the next, would the creditor be entitled to 5 per cent. interest for the first year and nothing for the second?

upon which the learned judge misdirected the jury, were not inferences to be drawn from commercial transactions, but matters of law.

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Cur. adv. vult.

In this term the judgment of the court was delivered by TINDAL C. J.

Two rules have been obtained in this action; one, on the part of the defendants, calling upon the plaintiff to shew cause, why the verdict found for him on the trial should not be set aside, and, instead thereof, a verdict entered for the defendants; the other, a rule obtained on the part of the plaintiff, calling on the defendants to shew cause, why the verdict found for himself, the plaintiff, should not be set aside and a new trial had.

The action was brought upon three agreements entered into between the plaintiff and the defendants, bearing date, respectively, the 10th day of *June*, the 1st day of *October*, and the 4th day of *November*, 1825, under which the plaintiff had agreed to sell to the defendants, and the defendants to buy of the plaintiff, certain iron works and other property, for a large sum, to be paid for, in part, by a certain deposit; and, as to the residue, by certain instalments with interest. The breach alleged in the declaration was the nonpayment by the defendants of the sum of 89,375*l.*, for five years and a half interest of the purchase-money upon 325,000*l.*, the residue of the purchase-money at the rate, as was alleged in the declaration, of 5 per cent. per annum, and also for the nonpayment of interest upon the said sum of 89,375*l.*, from the several days and times at which, according to the said agreements, the said interest ought to have been paid. The defendants had paid into court the sum of 87,312*l.*, being short of the sum claimed by the plaintiff for interest by 2063*l.*, contending, that upon the proper construction of the contract, the interest upon the last instalment of 75,000*l.* ought to be cal-

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culated at the rate of 4½ per cent. only, and not at 5 per cent.; and as to the interest claimed to be due *upon interest*, the defendants insisted that such interest was not recoverable by the plaintiff. The jury found a verdict for the plaintiff for the 2063*l.*; and the defendants have moved for this rule, by leave of Lord *Abinger* who tried the cause, for the purpose of ascertaining whether the interest is to be calculated at the rate of 4½ or at the rate of 5 per cent. On the other hand, the plaintiff has obtained his rule to set aside his own verdict, and for a new trial, on the grounds that the jury were bound by law to give him interest *upon the interest*, as claimed by him in his declaration.

The first question therefore raised for our consideration is, at what rate is the interest to be calculated upon the proper construction of the agreements?

By the agreement of the 10th of *June* 1825, the instalments of the purchase-money, the last of which, viz. 75,000*l.*, was payable on or before the 15th of *October* 1827, are to be paid, "with interest for the same sums at the rate of 5 per cent. per annum, to be reckoned from the 1st day of *October* next until the day of payment thereof, such interest to be paid by equal half yearly payments, and to be secured by the joint and several bonds of the defendants." By this agreement, therefore, — the first of the three, — the interest on the 75,000*l.*, upon which alone this question arises, is reserved at 5 per cent.

By the agreement secondly entered into between the parties, dated the 1st of *October* (*a*), certain alterations are made as to the time for completing the title, and in some other respects; but it is expressly provided (amongst other things) that nothing therein shall disturb or alter the interest upon the 75,000*l.* down to the 15th day of *October* 1827 inclusive; "but it was thereby

(*a*) *Suprà*, 283.

further agreed, that instead of the said instalments of 75,000*l.* being paid on the 15th day of *October* 1827, the said instalment of 75,000*l.* shall be left upon the security of the said estates and property at interest, at the rate of 4½ per centum per annum, and to be then made by way of mortgage to the said *John Attwood*, and with a covenant to pay the same, as well principal as interest, and to continue to a period of fourteen years from the said 15th day of *October* 1827."

Under this second agreement, therefore, if all had been done which was therein contemplated, namely, if the defendants had paid the first instalment of 200,000*l.*, and been let into possession, and had also paid the three several instalments of 100,000*l.* each and the interests thereon, then, instead of the defendants paying the instalment of 75,000*l.* on the 15th day of *October* 1827, that sum was to be left upon the security of the estates at 4½ per cent., to be then made by way of mortgage. But the events contemplated by that agreement never did happen; the defendants did not pay the instalments and interest, but on the contrary, filed a bill in chancery against the plaintiff, seeking to be relieved from the agreement on the ground of fraud; so that it appears to us, that if the question had rested on the second agreement only, the reduction of the interest upon the 75,000*l.* from 5 per cent. to 4½ per cent. never took place.

Then there is nothing in the third agreement (which is indorsed upon the second), which can have the effect of reducing the interest. The principal object of that agreement is, to relieve the defendants from all present liability to the payment of the instalments, with an express exception, that they shall still remain answerable for, and liable to, the payment of interest as in the said recited agreement expressed, that is, in the agreement 10th of *June* 1825, which is recited in the within written

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agreement of the 1st of *October*; and which recited agr ment reserves the interest on the 75,000*l.* at 5 per c So far, therefore, as the third agreement has any op ation, it would confirm the stipulation in the first as the rate of interest.

Looking, therefore, at the three agreements, we thi the interest was to be calculated at the rate of 5 per cen and that the verdicts should stand accordingly.

As to the second question, namely, whether the jur under the circumstances of this case, ought to ha allowed *interest upon interest*, the argument on the pa of the plaintiff has been, that the sums payable for i terest by the terms of the first agreement became del due to the plaintiff from the respective days on whi they fell due. It is, however, perfectly clear that it w not such a debt as before the statute 3 & 4 *W.* 4. *c.* 4 would have been held to carry interest: there w neither an express promise to pay interest on each su which should become due for interest, *nor was there written contract to pay a sum certain for interest on su sums*, so as to make the interest itself a debt due on day certain, nor was this a mercantile transaction which interest upon interest was usually allowed in t course of trade; and it is unnecessary to state, that actions upon bonds or other instruments on which i terest is reserved payable on a certain day, it is again all experience that the jury in their damages have ev calculated first the interest upon the principal, and th interest on each separate sum due for interest. If, ther fore, the plaintiff has any claim in this case for intere it must be under the provision of the statute befo referred to. But that statute leaves the matter entire in the discretion of the jury. "Upon all debts or sun certain, payable at a certain time or otherwise, the ju *may, if they shall think fit*, allow interest to the credit at the current rate of interest." In this case the poi

was expressly left to the jury for their determination; they did not think fit to allow the interest; and we see no reason whatever to question the propriety of their decision.

The consequence is, that we think that both the rules ought to be discharged. (*a*)

Defendants' rule, to enter verdict for the defendants, discharged.

Plaintiff's rule, for a new trial, discharged.

(*a*) According to the view presented on the part of the plaintiff, the verdict negativing the claim for interest upon the payments stipulated for, under the name of interest upon the instalments, but constituting, in effect, secondary instalments of the purchase money, would be a verdict against evidence. The application for a new trial appears, however, to have been made on the ground of misdirection, because it was not disputed but that if the matters which the Lord Chief Baron directed the jury to throw out of the case were properly withdrawn from their consideration, the finding as to the interest upon these payments could not be found fault with. Though the court abstained from pronouncing any direct opinion upon the question of misdirection, yet, as it is said in the judgment that "the point was expressly left to the jury," it must necessarily be inferred that the court were satisfied with the manner in which the question had been left; since the bare fact that the jury had decided upon a point which was within their competency, would have been no answer to a *well-grounded* charge of misdirection. If, indeed, it had been considered that the plaintiff was not entitled to interest at common law (as to which *vide antè*, 280. (*b*)), and that this was not a case within the 3 & 4 *W.* 4. *c.* 42. *s.* 28., giving the jury a discretionary power of adding interest, the question of misdirection would have been immaterial, and the judgment of the court would not have manifested any opinion as to the correctness or incorrectness of the Lord Chief Baron's direction.

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June 6.

DOE dem. BALLS *v.* MARGRAVE.

A motion for judgment, as in case of a nonsuit, made in *Trinity* term, is too early where issue had been joined (in a town cause) in *Hilary* vacation, though upon a rule drawn up as of *Hilary* term.

ANDREWS Serjt. obtained in *Easter* term *nisi* for judgment as in case of a nonsuit, an affidavit stating that issue had been joined in term last.

Greenwood shewed cause, upon an affidavit that issue had been joined in *Hilary* vacation, on the 9th of *March*. The defendant, therefor come too soon; *Fox* v. *M'Culloch* (*a*), *Duggan* v *braham*. (*b*)

Andrews Serjt., in support of the rule. Th fendant appeared and pleaded in *Trinity* term, a compelled by rule to join issue as of *Hilary* The rule being as of *Hilary* term distinguishes thi from the former case in this court; besides whic is a harsh action of ejectment for a forfeiture, whi court will not favour.

Sed per Curiam. Issue was joined after *Hilary* the application is, therefore, too early. If the who made the affidavit in support of the motion, i of swearing to that which was his own construct the practice, had stated truly the time when issu joined, this rule would not have been granted. It therefore, be discharged *with costs*.

Rule discharged with co

(*a*) 5 *Dowl. P. C.* 526.

(*b*) *Antè*, 240.; 8 *Dowl. P. C.* 582.; 1 *Scott, N. C.* 212.

(*c*) In *Duggan* v. *Wilbraham* (the *decision* in which case was *after* this rule ha moved for), the costs w rected to be costs in the on the ground that the was doubtful.

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Doe dem. David Howell *v.* Benjamin Thomas and Others.

EJECTMENT for lands in the parish of *Llanvirnach*, in the county of *Pembroke*, laying the demise on the 1st of *January* 1839.

At the trial before *Gurney* B. at the summer assizes, 1839, at *Haverford West*, the following facts appeared: —

10th of *March* 1740. By indenture of this date, made between *Dunnet Haweis*, of *Uny Redruth*, in the county of *Cornwall*, spinster, of the first part; *Joshua Howell*, clerk, rector of *Lanreathh* and vicar of *Pelynt*, in the same county, of the second part; and *John Francis Buller*, Esq., *Richard Hussey*, Esq., and *Thomasine Haweis*, widow, of the third part; *D. Haweis* assigned to *Buller*, *Hussey*, and *T. Haweis* certain leasehold hereditaments and a sum of 2000*l.*, upon trust for *D. Haweis*, until an intended marriage with *Joshua Howell*, and after the solemnization thereof, upon trust for *D. Haweis* for life, and after her decease, upon trust for *Joshua Howell* for life, and after the death of the survivor, upon trust to apply the leaseholds and the 2000*l.* for the portions of the children of the marriage in such proportion as *Joshua Howell* should appoint, and in default of appointment, to the children equally, and for default of such issue, upon trust for the executors and administrators of *Joshua Howell*.

11th and 12th of *March* 1740. By indentures of

In construing a devise, words are to be taken to comprehend a subject which falls within the usual sense of such words, unless the will contain a manifest and plain declaration to the contrary.

When therefore *A.*, seised of *Whiteacre*, *Blackacre*, and *Greenacre*, of which *Whiteacre* stands limited to *A.*'s issue in strict settlement, and must, on the death of *A.*, vest in *B.*, his eldest son, as first entailee, devises to his son, *C.*, *Blackacre*, and devises to his son, *D.*, all the remainder of his lands over which he has "a power of disposal," the reversion of *Whiteacre* passes, with *Greenacre*, to *D.*, although, in a remote part of the will, *A.*, in speaking of his control over *B.*, mentions *Whiteacre*, as an estate "over which he has no power."

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lease and release, the release being made betwe *Joshua Howell*, of the first part; *Buller*, *Hussey*, a *Thomasine Haweis*, of the second part, and *Dun Haweis* of the third part, in consideration of the s intended marriage, *Joshua Howell* granted, &c., un *Buller*, *Hussey*, and *T. Haweis* certain messuages, 8 called and known by the name of *Plas-Claen-gur* and *Pen-y-knurke*, in the parish of *Llanvirnach*, and certain messuage, &c. called and known by the name *Tyd-dyng Pant-y-gelly*, in the parish of *Henllanango* in the county of *Carmarthen-Habendum*, to *Buller*, *Hu sey*, and *T. Haweis*, their heirs and assigns, to the u of *J. Howell*, his heirs and assigns, until the marria and afterwards to the use of *Joshua Howell* and l assigns for his life, *sans* waste; remainder to the use *D. Haweis* and her assigns, for her life, for her jointu and in lieu of dower; remainder to the first son of t marriage, and the heirs male of the body of such fi son; and for default of such issue, to the use of t second, &c. sons, in like tail; and for default of su issue, to the use of all and every the daughters of su marriage, as tenants in common in tail, with cross-mainders in tail between them; and for default of su issue to the use of *Joshua Howell*, his heirs and assig

The marriage between *Joshua Howell* and *D. Hax* was duly solemnised soon after the date of the indent of release, and the issue of the said marriage were *L Howell*, *James Howell* (a lunatic) the eldest son, *Da Howell*, *Thomasine Howell*, and *John Francis Howell*.

Joshua Howell died in 1785, leaving the said *Dun* his widow and *James Howell* his said eldest son, and four other children him surviving. *Dunnet Howell* di in 1800, whereupon *James Howell* entered into poss sion of the said real estates so settled as aforesaid, a continued in possession thereof until the 9th of *Novem* 1838, when he died without issue, all his brothers a

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sisters having previously died without lawful issue: whereby the reversion in fee became an estate in possession by failure of all the objects of the prior limitations. The landlords of the defendants are the heirs of *Joshua Howell*, and are also the heirs of the lunatic *James Howell*, and of all other children of *Joshua Howell*.

Joshua Howell left a will, bearing date 6th of *February* 1782, in which was contained the following devises and bequests:—"I give and devise unto my son *John Francis Howell* all manerial rights, and all messuages, lands, tenements, and hereditaments of which I am seised in fee simple, or of any estate of freehold or inheritance in the parish of *Lansallos*, in the county of *Cornwall*, to hold unto my said son *J. F. Howell* and his heirs and assigns for ever: also I give and devise unto my son *David Howell*, all other my manors, messuages, lands, tenements, and hereditaments whatsoever and wheresoever, of *which I have power to dispose*, to hold to my said son *David Howell*, and to his heirs and assigns for ever; I give and bequeath to my daughter *Lucy Howell* the sum of 3000*l.*, to be paid her in one month after my decease, with interest from the day of my death; I give and bequeath to my daughter *Thomasine Howell* 1500*l.*, to be paid her in one month after my decease, with interest from the day of my death, I having, in some degree, provided for her. The above devises and bequests to my said sons and daughters I will and direct shall be in full of all claims they may have, or be entitled to, upon, or out of my estate, real and personal, under my marriage settlement, or otherwise. And whereas in and by the settlement made on my marriage with my present dear wife *Dunnet*, I have power to appoint the sum of 2000*l.* to and amongst my children as I should judge proper, I do hereby give my eldest son *James* the sum of five guineas, part thereof, in full of his share of the said sum of 2000*l.*, and of all claims he has, or can make, under

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my marriage settlement or otherwise, save in regard the real estates which are settled upon him, *and o which I have no power.* All the rest and residue of estate and effects whatsoever and wheresoever, incl ing the remainder of the said sum of 2000*l.*, I give my said dear wife *Dunnet;* and do appoint her s executrix of this my will."

David Howell, the son of *Joshua Howell*, left a natu son *David Howell*, the lessor of the plaintiff, and a tural daughter, both of whom were acknowledged their father and recognised by his family. *David How* the son of *Joshua*, made a will, by which, after other quests, he devised all the remainder of his property, r and personal, consisting of manors, lands, mone securities, and all other property and effects of wh nature soever they might be, unto *David Howell*, t lessor of the plaintiff, and his heirs for ever, upon attaining the full age of twenty-one years.

Joshua Howell died seised of real estate of inher ance, which passed to his son *David Howell*, under t general devise to him, other than the reversion in fee the settled estate.

The indentures of 11th and 12th of *March* 1740 w produced from the custody of the lessor of the plaint It was objected that these ought to have been in the cu tody of the trustee of that settlement, or their repr sentative. But the objection was overruled by t learned judge. (*a*)

A question arose as to the identity of the prope occupied by the defendants, with that described in t settlement of 1740; the estates occupied by the d fendants being now known by name different from th mentioned in the settlement, and there being other lar in the parish known by the name under the settleme

(*a*) 12 *Vin. Abr., Evidence* (A. b. 5.); *Bull. N. P.* 255.

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It was shewn that the names of farms in *Wales* are generally descriptive, and that the description was applicable to the lands sought to be recovered, and the counsel for the plaintiff undertook to prove that rent had been paid for the lands claimed to the parties successively entitled under the settlement.

John James, one of the heirs of law of *Joshua Howell*, and of his children, and one of the landlords of the defendants, who had been committee of *James Howell* the lunatic, was called as a witness for the plaintiff. It was objected that he was one of the real defendants in the action. This objection was overruled, and the witness was examined.

John Griffiths, one of the defendants on the record, was called as a witness for the plaintiff; but being objected to, was rejected by the learned judge. (*a*)

For the plaintiff, the commission of lunacy against *James Howell*, and the proceedings under it, were tendered in evidence. It was objected, that neither the defendants nor their present landlords were parties to these proceedings. It was answered, that the defendants had held under, and paid rent to, the lunatic, and were bound by any thing which affected the title of their landlord. This evidence the learned judge rejected.

James Good, a land surveyor, who had been employed upon the property by *George James*, produced a map of the lands occupied by the defendants, which he had made by the direction of *G. James*, who stated that he was acting as agent for Mrs. *Howell*. It was objected that what *G. James* had said was not admissible in evidence. This objection was overruled. It was also objected that the map could not be received in evidence. The learned judge did not expressly decide upon the ad-

(*a*) But see *Norden* v. *Williamson*, 1 *Taunt.* 378.; *Hall* v. *Curzon*, 9 *B. & Cres.* 646., 4 *M. & Ryl.* 565.; *Worrall* v. *Jones*, 7 *Bingh.* 395., 5 *Moo. & P.* 251.

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missibility of the map, but it was not handed to the The identity of the lands in the county of *Carmar* described in the settlement, with those occupied b defendants in that county, was admitted; but it contended by *E. V. Williams*, for the defendants, there was no sufficient evidence to identify the lan *Pembrokeshire*. The learned judge said that he sh reserve the point of law, arising upon the constru of the will of *Joshua Howell*, for the consideration c Court; but that the simple question for the jury whether the lands for which the ejectment was bro were the same as those named in the settlement. jury returned a verdict for the plaintiff.

Nov. 1. 1839. In *Michaelmas* term following, *Wilde* Serjt. obta a rule calling upon the plaintiff to shew cause w verdict should not be entered for the defendants, or a nonsuit should not be entered, or why there sh not be a new trial. As the rule was originally m for and granted, it went on to order that "as we the facts relating to the new trial, as the matter of arising in this case, be stated in a special case t argued by counsel on both sides, and that the rul enlarged until after the argument." On the last d *Michaelmas* term the latter part of the rule was st out on the motion of Mr. *Evans*, for the plaintiff.

Jan. 11. 1840. After the note of *Gurney* B. had been rea *Maule* J., the Court directed that the point of upon the will, should be first argued.

Talfourd Serjt. now shewed cause. The enjoy of the property by *Joshua Howell* the settlor and

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visor, and, upon his death, by his widow, and afterwards by the lunatic son, was established to the satisfaction of the jury. It was not disputed that the reversion was a devisable interest in *Joshua Howell*, or that it came within the words in the will "of which I have power to dispose." It was not necessary that the testator should have the reversion present in his mind. It is sufficient if he intended to give all properties which he possessed, and which came within the limits of the description. The subsequent clause, in which he uses the expression "over which I have no power," when rightly considered, confirms this view of the intention of the testator. The leading case upon the subject is that of *Chester* v. *Chester*. (*a*) There the devise was, "of all the testator's lands, tenements, and hereditaments, in these three towns of *Littleton*, *Marston*, and *Milbrooke*, or elsewhere, not by him formerly settled, or thereby by him otherwise disposed of," to trustees for the term of 100 years, "remainder to his said younger son, *John Chester*, in fee." It was held, that the reversion in fee of the settled lands passed to *John Chester*, the son, by the devise, though the testator had other lands in possession which passed under the devise. In *Cooke* v. *Gerrard* (*b*), the testator, having settled part of his estate upon his daughter for life, devised a messuage to her for a year after his death; and by the same will devised to *T. K.* all his lands not settled or devised, *habendum* after one year after his death, and after the death of his daughter. It was there admitted, that the reversion of the settled portion of the estate passed by the estate; and the only contest was, whether the interest which *T. K.* took in the house was postponed till after the death of the daughter. In *Morgan dem. Surman* v. *Sur-*

(*a*) 3 *P. Wms.* 56. (*b*) 1 *Lev.* 212. 1 *Wms. Saund.* 181.

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man (*a*), it is true that Sir *James Mansfield* represented as making an interlocutory observa in which he expresses, in strong terms, his faction with the decision in *Chester* v. *Chester* the same breath he confirms and sets up the aut that case, by observing that "it has been foll by a hundred others." It was followed by Lor in the *Attorney-General* v. *Vigor* (*c*), where it that a remote reversion in lands to be purcha settled, will pass under a devise of "all ar other messuages, lands, tenements, and heredit although the uses declared in the will of the lands, &c. be immediate. In *Strode* v. *La sell* (*d*), the words were, "all other his lan ments, and hereditaments *out of settlement*;" a held (*e*), that the reversion of lands of which tator was secured in tail, with the reversion to h fee, passed. In *Glover* v. *Spendlove* (*g*), the had, upon his marriage, settled freehold and lands on himself for life; remainder to his wife remainder to their first and other sons, in t with remainder over; reversion in fee to himsel being, no issue male of the marriage, but five d testator devised, to them and their heirs, all l not settled in jointure on his wife: held, reversion of the lands in settlement passed. in this will nothing inconsistent with the that every thing in *Cornwall* should go to one every thing in *Wales* to another.

(*a*) 1 *Taunt.* 289.

(*b*) *Post*, 352.

(*c*) 8 *Ves.* 256. And see the cases cited in the notes to the *American* edition. *Cruger* v. *Heyward*, 2 *Desaus. Cha. Rep.* 422.; 1 *Johns. Cha. Rep.* 482.; *post*, 347.

(*d*) 2 *Vern.* 621.

(*e*) *Semble*, by *Tr cey*, and *Scroop*, L missioners of the from 26th *Septemb October* 1710, as M *Tracey* is mentioned and other members o are referred to.

(*g*) 4 *Bro. C. C.*

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Wilson, on the same side. By the settlement of the personal property, which was given in evidence at the trial (*a*), it appeared that *Joshua Howell* was tenant for life of the personal estate of his wife, with a power of appointment; and though it may be supposed, *primâ facie*, that the devises are inconsistent, that will not appear to be the case when it is considered that the bequest to *James* is merely in respect of the personalty. It is impossible to distinguish this case from that of *Chester* v. *Chester*. In *Goodright dem. Earl of Buckinghamshire* v. *Marquis of Downshire* (*b*), Lord *Alvanley* C. J., in delivering the judgment of the court, says, "The principles upon which the case is to be determined were not disputed. It was admitted, on the part of the lessors of the plaintiff, that it was incumbent upon them to prove, by necessary consequence arising from the other parts of the will, that the residuary clause had not the operation which, according to the rules of construction, it was allowed to have, namely, that of carrying every real interest of every kind whatsoever, whether known or unknown to the testator, provided it were not manifestly excluded. It was admitted that it was necessary to shew, that it would be inconsistent with the general intent of the testator, and the particular provisions of the will, to impute to the testator any intention to convey the one third of a moiety of the estate of which he was seised as right heir of Mr. *Farrington*; and that it was not necessary that the testator's mind should be active in including the subject matter; but that, even if he did not know that he had it, still it would pass, provided he did not mean to exclude it."

The effect of general words in a devise in passing all the testator's estate in possession, in remainder, or in reversion, can be controlled only by express words, or by an intention clearly and plainly to be collected from

(*a*) *Suprà*, 334. (*b*) 2 *Bos. & Pull.* 600.

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the will; *Strong* v. *Teatt in error.* (*a*) It is not unusual for an estate tail and the reversion in fee to be vested in the same person; *Doe dem. Wright* v. *Child* (*b*), *Attorney-General* v. *Vigor* (*c*), *Church* v. *Mundy* (*d*), *Doe dem. Moreton* v. *Fossick* (*e*), *Mostyn* v. *Champneys.* (*g*) Here the clause is sufficient to pass the reversion, and it is not affected by the reversionary clause, which relates to personalty only. The testator had power to dispose of the reversion, and he has effectually done so.

E. V. Williams, in support of the rule. In construing a devise, the court must look at the intention of the parties. [*Maule* J. A party may think that he has power when he has no power, and yet he may wish to pass all; he may say, I give all I can dispose of, whether I think I can dispose of it or not — it does not follow from the language used, that he meant to exclude. *Erskine* J. There is a great difference between an intention to exclude, and the absence of intention to include.] In *Goodtitle dem. Daniel* v. *Miles* (*h*), it was held that the reversion of settled lands did not pass by the will, but were excepted out of the general clause by the force of the restrictive words, "and which are not settled in jointure." In *Goodwyn* v. *Goodwyn* (*i*) Lord *Hardwicke* doubted as to the effect of the word "estates" in passing a reversion in fee: *Roe dem. Allport* v. *Bacon* (*k*), *Fletcher* v. *Smiton.* (*l*) [*Maule* J. An exception must be of a thing which would be included but for the exception; the words, over which I have no power, were true in the sense of interest, false in respect to the land.]

(*a*) 2 *Burr.* 912.; 1 *W. Bla.* 200.
(*b*) 1 *N. R.* 335. 341.
(*c*) *Suprà*, 341.
(*d*) 12 *Ves.* 426.; 15 *Ves.* 396.
(*e*) 1 *B. & Adol.* 186.
(*g*) 1 *New Cases*, 34[illegible] 1.; 1 *Scott*, 293.
(*h*) 6 *East*, 494.; 2 *Sm[illegible]th*, 467.
(*i*) 1 *Ves. sen.* 226. 229.
(*k*) 4 *M. & Selw.* 366.
(*l*) 2 *T. R.* 656.

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The testator was not a lawyer. [*Maule* J. Do not the words mean, I give five guineas instead of all except that which I cannot prevent his having.] *Strong* v. *Teatt* (*a*) shews that the effect of general words may be controlled by the intention, to be collected from the general contents of the will; *Roe dem. James* v. *Avis.* (*b*) It must be admitted, however, that, in *Church* v. *Mundy* (*c*), Lord *Eldon* expressed himself dissatisfied with *Roe* v. *Avis*; but Lord *Eldon* differs from Lord *Kenyon* and Sir *William Grant* in that case; *Welby* v. *Welby.* (*d*) In *Horsfall, Ex parte* (*e*), it was held, that the legal estate in mortgaged premises did not pass under a general devise, but descended to the heir at law. The principle is, that if it appear that the testator had no intention that the property should pass, it will not pass.

Nicholl, on the same side. It was not the intention of the testator, in using these general words, that the reversion should pass; the words in the subsequent clause shew in what sense the like words were used in the devise to *David Howell.* If such estate means lands in settlement, the testator excludes real lands. *Quâcunque viâ datâ*, no interest in the property passed to *David Howell*; *Cook* v. *Gerrard.* (*g*) In *Mostyn* v. *Champneys* (*h*) there are no such words: there the testator was tenant in tail, and might have disposed of the property as he pleased, by suffering a recovery; *Moore* v. *Magrath.* (*i*) [*Erskine* J. In that case there was something on the face of the will which shewed that nothing but the undivided moiety was intended to pass; *Doe dem. Davis* v. *Saunders* (*k*), *Doe dem. Reade* v. *Reade* (*l*), *Doe dem. Pell* v. *Jeyes.* (*m*)]

(*a*) *Suprà*, 343.
(*b*) 4 *T. R.* 605.
(*c*) 15 *Ves.* 403.
(*d*) 2 *Ves. & B.* 187. 194.
(*e*) *M'Clel. & Y.* 252.
(*g*) *Suprà*, 340.
(*h*) *Suprà*, 343.
(*i*) *Cowp.* 9.
(*k*) *Ibid.* 420.
(*l*) 8 *T. R.* 118.
(*m*) 1 *B. & Adol.* 593.

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Tindal C. J. The question in this ca the ultimate limitation to *Joshua Howell*, assigns, which is found in the marriage reversion expectant upon the determin estates tail, did or did not pass by the will in 1782. It is admitted, and, I think, v that reversions are included in a devise general words, unless a manifest intenti should not be included appear upon th will. I think it is impossible to contend, a sion in *Chester* v. *Chester* (*a*), followed by cases which have been discussed in the argument, that under general words of though they may, in terms, refer to the e the reversion belongs as a settled estate, s may not pass under the devise; and I t cannot be laid down better than it was by L in *Church* v. *Mundy* (*b*), where he says strongly influenced towards the opinion th justice is not, by conjecture, to take out of general words properties which those wo considered as comprehending." The bes struction is that which makes the word hend a subject that falls within their usual there is something like declaration plain trary." The question is, therefore, wheth this will a manifest and plain declaration to take the case out of the ordinary rule of been put by Mr. *Williams* on three dist that the Court ought here to see that su intention does exist. First, he says, if yo terms of the will of *Joshua Howell*, it is cl he devises to his son *David Howell*, he

(*a*) 3 *P. Wms.* 56.; *suprà*, 340.

(*b*) 15 *Ves.*

(*c*) 15 *Ves.*

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tinction between some property which he had a right to dispose of, and some property over which he had no such right, because he devises to *David Howell* "all other his manors, messuages, lands, tenements, and hereditaments whatsoever and wheresoever, of *which he has power to dispose.*" It is clear that that is not a sufficient ground of objection, *standing by itself.* It is enough to say, in answer to that objection, that as he has power to dispose of the reversion in question, that may well pass under a devise so expressed.

It is said further on the part of the defendant, that if you look at the terms or conditions on which the devises are made to the several children, it is manifest that the testator never could have intended that an ultimate reversion, which would be of little value, should be given in place and stead of property they would immediately have come into possession of.

The words in the will to raise this objection are, that "the above devises and bequests to my said sons and daughters, I will and direct, shall be in full of all claims they may have or be entitled to upon or out of any estate, real or personal, under my marriage settlement or otherwise." Let us see what it is that the testator gives to the different children, upon terms thus precluding them from claiming under the marriage settlement. The first of these devisees, *John Francis Howell*, takes an estate in *Cornwall* in immediate possession, with all the manorial rights, messuages, lands, tenements, and hereditaments, in the parish of *Lansallos*, in the county of *Cornwall.* What could he have taken under the settlement? *James Howell*, the eldest son, takes an estate in tail; and the devisee, *John Francis Howell*, could only have taken an estate tail in remainder. Very little, therefore, had he to give up, when he would be contented to have taken an estate in possession (with the value of which we are not made

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acquainted) in *Cornwall.* The devise to *David Ho* is, of all other the lands, tenements, and messua whatsoever and wheresoever, of which the testator the power to dispose, to hold to him and his heirs assigns for ever; and the question is, whether testator, having other manors or lands that did p by such devise, this reversion, which the testator l manifestly the *power* to give, would pass also? W hardship is imposed upon the devisee, *David Howell,* like his brother *John Francis Howell,* he also only g up an estate tail in remainder, (which, in the case *David Howell,* would be after *two* interposed estates ta — in calling upon him to accept a present interest in sc land, and the reversion of other land, to be enjoyed wh ever it may vest in actual possession? So the daught could only take an ultimate estate tail in remainder, tenants in common. Under the will, one daughter ta 3000*l.* immediately, the other 1500*l.*, she having been p viously, in part, provided for. I confess, therefore, th to my mind, this second ground of objection, arising of the circumstance, that the devises and bequests w made in satisfaction of the claim which the devisees a legatees might set up under the settlement, does not a pear, by any means, sufficient to lead to the infere that this reversion was not intended to pass.

Then the third ground which is insisted on is, th looking at the devise to the eldest son *James,* it is cl that the estates which were settled were not intended pass; that is, that the word "estates" is to have a w signification, and to comprehend that ultimate revers of the settled estates, as well as the estate itself. T words are, "I give to *James* five guineas in full of share of 2000*l.*, in full of all claims he has, or c make, under my marriage settlement or otherwise, havi regard to the real estates which are settled upon him my marriage settlement, *and over which I have no powe*

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The plain meaning of those words is, that, in so far as they are settled on him, I have no power over them, that is, as far as the tenancy in tail goes, which was the only part settled, and which the testator could not dispose of; for by the very same settlement he takes (I don't know why we should assume he was ignorant of it) an ultimate reversion in fee simple, of which he *had* power to dispose. I therefore think that this case is brought within the sensible and practical rule laid down by Lord *Eldon*, that "the best construction is, that which takes the words to comprehend the subject which falls within the usual sense of these words, unless there be something like plain declaration to the contrary." To my mind there is no declaration to the contrary; but as far as I can read the intention of the testator, it was that every thing he could dispose of should be given to *David Howell*, the second son.

Coltman J. I take the rule of law to be well established, as laid down by Lord *Eldon* in the 15th *Vesey* (*a*), and adopted by Lord *Tenterden* (*b*), namely, that general words in a devise will carry a reversionary interest, unless it clearly appears that the intention of the party was that they should not carry it. It is important that general rules should never be broken in upon without some strong substantial ground. It does not appear to me that in this case enough has been shewn by Mr. *Williams* to satisfy the Court that the party had an intention that this should be excluded, and that the reversionary estate should not pass. It seems to me that the substantial part of the argument advanced on behalf of the defendants is, that it appears on the face of the will that the testator *Joshua Howell* supposed that the effect of his marriage settlement had been to vest

(*a*) P. 406. (*b*) 1 *B. & Adol.* 600.

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inalienably in his eldest son the whole interest in th estate. In construing the will according to that aspe of it, nothing of that sort appears. What is it l states? "I do hereby give my eldest son *James* tl sum of five guineas, part thereof, in full of his share the said sum of 2000*l.*, and of all claims he has or c make under my marriage settlement, or otherwise, sa in regard to the real estates which are settled upon hi by my marriage settlement, and over which I have a power."

It is perfectly true, taking the words literally, that "estates" is meant the interest of the party. In tl case the testator has a power over the estates which a settled upon his son *James* by marriage settlement; a I do not see that the other clause, which has been reli on, leads to any conclusion that he did not understa the real nature of the interest, namely, that it was settl in succession upon the different sons, then upon the daug ters, as tenants in common, with the ultimate reversi to himself in fee. What is the other clause relied o "The above devises and bequests to my said sons a daughters I will and direct shall be in full of all clai they may have or be entitled to upon or out of a estate, real or personal, under my marriage settlemen That seems to me to lead rather to the inference that understood that each of them (both sons and daughte had a claim under his marriage settlement, namely claim in remainder, which they really had to the est tail. I find therefore nothing on the face of the w which satisfies me that the testator did not perfec understand the nature of the interest he had. I can s no reason why it should not pass by these words, "e my interest whatsoever of which I have power to d pose." I think therefore that the Plaintiff is entitled the verdict.

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ERSKINE J. I am of the same opinion. It is impossible to read this will without seeing that it was the intention of the testator to dispose of every species of property over which he had a disposing power. That does not appear to be denied; because it is admitted that the words by which *Joshua Howell* devises estates to his son *David*, are large enough to cover every species of real property of which the former had any power to dispose, and that the residuary clause to his wife would be sufficient to cover all his personal effects.

But it is argued, that it is clear from this will that the testator had imagined that the real estates which were settled on his sons and daughters in tail, had been irrevocably and altogether settled on the eldest son, and that he had *nothing to dispose of* in respect of them; and therefore, that although it was his intention generally to dispose of all his property over which he had a disposing power, yet inasmuch as he did not *know* that he had power to dispose of any thing relative to those estates, those estates were not in his contemplation, and that the fact that they were not in his contemplation appears on the face of the will, and that therefore they will not pass by the general words of the devise to *David Howell*.

That is the way in which I understand the argument of Mr. *Williams*. He seemed to go further; he was not satisfied with saying, that if it appeared by any part of the will that the testator intended to exclude this property, it would not be included; but he seemed to think that if it appeared on the face of the will, *that he had not the estate in his contemplation at all*, though he might not have intended to *exclude* it, yet it would not be included in it. Looking at all the cases cited, the doctrine is clear, that where general words are used large enough to include the estates in question, the estates will pass by such words, unless it appear on the face of the will that

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the intention of the testator was, that they should not be included.

Then it is further argued, that it does appear on the face of the will that the clause "save in regard to the real estates which are settled upon him by my marriage settlement, and over which I have no power," shews that it was the intention of the testator that such estates should not be affected by the will, because he had only left those estates of which he had power to dispose, and he here declares that he has no power over the estates settled by his marriage settlement.

Looking at the language which has been used, I agree with my Lord Chief Justice and my brother *Coltman* that those words do not bear the interpretation which has been put on them, because the testator does not thereby say that he *has no power at all* over any of the property in respect of which his eldest son had an estate by the marriage settlement, but merely that he had no power to dispose of those estates settled on him; and that appears to me the proper interpretation of this will and as we have been invited to put a common sense interpretation upon it, I think we are doing no more. The testator says, "I do hereby give my eldest son, *James* the sum of five guineas, part thereof in full of his share of such sum of 2000*l.*, in full of all claims he has, or can make, under my marriage settlement or otherwise, save in regard to the real estates which are settled upon him by my marriage settlement, and over which I have no power." The bequest to *James* has reference not to the reversionary estate devised to *David*, but to other property. The terms of the bequest to *James* do not import that the five guineas was to be in lieu of the interest of *James* in property over which the testator had no control, but in lieu of property over which he had control. I am, therefore, of opinion that the general words in which the devise to *David Howell* is made are sufficient to carry the reversionary interest.

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MAULE J. I am also of opinion that the reversionary interest which *Joshua Howell* had under his marriage settlement passed under the general devise to his son *David*. It is admitted that the words of the general devise are sufficient to pass such an interest, unless something else in the will would control their effect. I do not think that the rule to be applied to this case is to be treated as a *positive rule*, by which we are *bound* in consequence of its being admitted in the courts to be an independent principle. It appears to be a branch of the general rule, that the intention of the testator is to prevail. That rule was once found fault with by Sir *James Mansfield* (a), but I think the current of authorities, before and since his time, are to be preferred to his opinion on the subject. The ground on which that doubt of Sir *James Mansfield* was founded seems to have been this, that it is rather too strong a thing to say that the testator passed by his will property which was not in his mind at all, and which he did not think of. I do not consider it a very unlikely or unreasonable thing that there should be such an intention in the mind of the testator. On the contrary, it would be unreasonable to say that the testator did not pass any thing by his will, unless he had some map or rent-roll before him. Nothing is more likely than that a person, not knowing what property he has, where it is, or what the description of it may be, should yet have this intention, — that every thing he could, he would give. That seems to be the intention evinced by the testator by the use of such words. This merely goes to the *reasonableness* of a long current of authorities by which we are *bound*. I think they are binding on the Court, not only on account of their num-

(a) In *Morgan dem. Surman* v. *Surman*, 1 *Taunt.* 289., where Sir *James Mansfield* speaks of the judgment in *Chester* v. *Chester* as "a shocking decision." *Suprà*, 341.

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ber, but also by reason of the principle on which t are founded.

The question comes to this, whether the testator shewn that he intended to exclude this property, wh otherwise would pass, from the effect of his residu devise. It is urged that he intended to do so, pa because (it is said) this is a remote reversionary inte and of small value, and, therefore, it is not likely should have given it in satisfaction of something wh the devisee could claim immediately on his death, which was of considerable value. Whether that argum would be entitled to any great weight I will not s But in order to raise such an argument, it should shewn that this residuary interest was the only thi which *David Howell* was to have in exchange for, satisfaction of, that for which it is to be taken in sa faction. That is by no means the case, for the testa bequeaths all his lands, tenements, and hereditame whatsoever, and wheresoever. Where a devise is m in satisfaction for something else, is that any reason excluding as part of that devise something, because i rather special or remote? I cannot see that it furnis any reason at all. It appears to me that the testa probably had his marriage settlement before him at t time he made his will, because he recites that by the s tlement on his marriage he has power to appoint a s of 2000*l.* to and among his children as he shall thi proper. He had either a very good recollection of t settlement, or he had it before him. The probability that he had it before him. Then comes the clause, which much reliance is placed for the defendants, t he gives to his son *James* the sum of five guineas, p thereof in full of his share of the sum of 2000*l.* with spect to which he might give among all his children. gives him five guineas. He does not give any thing

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his other children out of that, but he gives all the residue of the 2000*l.*, except the five guineas, to his wife. But then he has given to his son, *John Francis*, the *Cornwall* estates; to his son, *David*, he has made the devise in question; to *Lucy* he has bequeathed 3000*l.*, and to *Thomasin* 1500*l.*; so that he has given a full satisfaction to his other children for that which he might have appointed out of the 2000*l.* I think what he had in contemplation as to the satisfaction, was the claim they had in respect of that 2000*l.* Then *he* further says, he gives the five guineas to *him* in lieu of all claims he should have under *his* marriage settlement, save in regard to the real estates which are settled upon *him* by *his* marriage settlement, and over which *he* has no power. This clause of the will has no reference to the previous devise to *Daniel Howell*. The matter which the testator had in hand when inserting that clause, had no connection with the devise to *David Howell*. He is then concerning himself only with the way in which he should deal with the right of his son *James* to a portion of the 2000*l.* So that the probability is, that the words "over which I have no power," were not intended by the testator in any way to influence *James*. I understand the testator to say, in effect, "I give it him in satisfaction of all claims he may have under my marriage settlement, save in regard to the real estates which are settled upon him by my marriage settlement, and over which I have no power;" that is, "which I cannot prevent his having, or, of which I have no power to deprive him; and I do not affect to exercise such power." If so, the words have no meaning at all (even if read ever so much in juxta-position to or in combination with other devises) which could qualify the devise to *David*. It has been assumed, in argument, that these words "over which I have no power," are equivalent to an assertion by the testator, that he had no power over the reversion, and

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that therefore that reversion would not pass. Probabl is not necessary to decide that. I am far from think that such an assumption is one that ought to be gran It may very well be, that a person, when he has finis a devise, and has done with it, may, in a subsequent of his will, make an erroneous assertion on the subje that prior devise. I think that such erroneous asser will not have the effect, in any degree, of limiting devise which has gone before. That was so decided in well known case of *Smith* v. *Doe dem. Lord Jersey* (*a*), which it was held, that a positive allegation in a sub quent part of the will, that a certain estate was in t county of *Glamorgan*, did not limit to the county *Glamorgan* the previous devise of the estate by nam but that it might be construed as comprehending pr perty in the county of *Brecon*. So that if the wor had been, "that the testator had no power to devi the reversion in the settled estate," it would not at follow, because he used inapt words to devise all could devise, that it was not his intention that the words should prevail in the event of his being mistak and his having something more than he knew of, different from what he supposed. These general wor therefore, may be, and often are, used by persons w draw wills, for the purpose of carrying property, of power to dispose of which the testator may not at t moment be aware, or respecting which he may not kn what the precise nature of his rights are.

Therefore I think, on the whole, notwithstandi the great number of authorities which have been cit on both sides, that the clear intention of the testator to be gathered from the will itself; and that this i tention was, that every thing should pass to the devi

(*a*) 2 *Brod. & Bingh.* 473., 5 *B. Moore*, 332. and see *Doe*, *dem. Douglas* v. *Lock*, 4 N *& M.* 815., 2 *Ad. & El.* 70

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which could pass under the terms of the second devise, and that the reversion passed also. (a)

The question of nonsuit, upon the construction of the will, being disposed of, the defendant's counsel applied to be heard upon the application for a new trial on the ground of the improper reception of evidence, namely, the statement by the witness *Good*, that in his early days he had been a land surveyor, and that many years ago a person called upon him, stating that he was sent by Mrs. *Howell*, and that Mrs. *Howell* wished him to make a map of the lands, and that he received such and such information, which statement as to information derived from a person not called, was alleged to have been inadmissible.

On the part of the plaintiff it was admitted that this statement, if received in evidence, had been improperly received; but the counsel for the plaintiff refused to allow this question to be decided, as proposed on the part of the defendant, by the notes of the counsel on both sides, saying, that as no doubt really existed as to the identity of the property, they claimed their right to have this point decided by the notes of the learned judge.

On the part of the defendant it was stated that the Court of Exchequer had acted upon the notes of counsel, in a case where the notes on both sides differed from that taken by the learned judge.

(a) And see *Bac. Abr.* tit. *Legacies and Devises* (L. 2.); 8 *Vin. Abr.* 273.; 10 *Bythewood's Conveyancing*, by *Jarman*, 159. So a devise of lands "not before devised," *Rooke* v. *Rooke*, 2 *Vern.* 461., 1 *Equity Cases Abridged*, 210.; or, of lands "not before disposed of," *Willows* v. *Lydcot*, 2 *Ventr.* 285., 3 *Mod.* 229., *Carthew*, 29. 50., 1 *Equity Cases Abridged*, 210., has been held to carry the reversion in lands before devised for life. But see *Hyley* v. *Hyley*, 3 *Mod.* 228., *Comberb.* 93., *Doe, dem. Morris* v. *Underdown*, *Willes*, 293., *Goodtitle, dem. Daniel* v. *Miles*, 6 *East*, 494., 2 *Smith*, 467.

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13th *June*. On a subsequent day, *Erskine* J. sta he had seen *Gurney* B. who informed him, that dence (*a*) was not received, and did not go to t and that besides the evidence which he had repo he having only reported the evidence bearing u particular point on which the motion had been n there was other evidence upon which the jury w warranted in finding a verdict for the plaintiff. (Rule disc

(*a*) Meaning, probably, the evidence of agency derived from *Good*'s statement, as to his being employed by a person describing himself as agent to Mrs. *Howell* in mapping the estate. In the report of the learned judge it was stated, that he at first refused to receive the map made by the witness *Good* in evidence; but that Mr. *Evans* said, "I offer it in evidence thus: — *I have proved* that in 1790 *the agent* of Mr. *Howell* employed *Good* to make this map, and that the premises, at that time so mapped, are those belonging to the defendant." Upon which Mr. B. *Gurney* reports that he said, "I do not see how the map would advance the case; but the witness *Good* has given the map as correctly describing the premises; and, therefore, I admit it."

(*b*) So in *Doe, dem. Lord Teynham* v. *Tyler*, 6 *Bingh.* 561., 4 *M.* & *P.* 3 Court held, that it w ground for granting a that evidence had mitted which ought been rejected, if, exclusi evidence, there were e warrant the finding of But in the more re of *The Baron de Rū Wife* v. *Farr* (a case before the same learn in *Pembrokeshire*) 5 *M.* 617., 4 *Ad.* & *Ell* Court of King's Ber that the alleged immate evidence improperly was not a ground for a new trial, unless t were able to see that dence had not weighed jury in forming their or that an opposite verd upon the remainder o dence in the cause, mu sarily have been set being a verdict ag dence.

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VAUGHTON *v.* BRINE, BAILEY, and THORNE.

June 1.

ASSUMPSIT, for the work and services of the plaintiff as clerk and secretary to and for the defendants, upon their retainer, and at their request. Plea, non assumpsit. By his particulars of demand, the plaintiff claimed 20*l.* for four weeks' salary, from the 18th *September* to the 16th *October* 1839, as clerk and secretary to the defendants.

At the trial, before the undersheriff of *Middlesex*, in *December* last, the two first-named defendants alone appeared to defend. The following agreement (which was duly stamped), dated the 5th *June* 1839, and signed by the three defendants, was given in evidence on the part of the plaintiff.

"We, the undersigned, forming the provisional committee of a projected association of persons intended to be called 'The *Brighton* and *Sussex* Zoological Association,' having, in order to carry into effect the intention of the said association, entered into articles of agreement with the *Norwich* Union Assurance Company for the purchase of certain premises situate at *Brighton*, and known as *Ireland*'s Gardens, do hereby acknowledge the past services of *John Vaughton* in canvassing for, negotiating, and generally assisting in the preliminary business of and connected with, the said Association; and, in consideration of such past services, do hereby, for ourselves jointly and severally, undertake and agree to appoint the said *John Vaughton* to the office of secretary to the said association, to be held by him so long as we shall be in the direction and controul

A resolution of an unincorporated association, signed by the parties making it, for the appointment of an individual to the office of secretary to the association for a specified period at a weekly salary, is not an agreement or memorandum of an agreement, requiring a stamp, within *55 G. 3. c.* 184.

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of the said association, at a minimum salary of 25 [illegible] per annum from this date; and we do hereby join [illegible] and severally especially undertake and agree not part with, or relinquish, the management of the s[illegible] Association without first securing to the said J[illegible] *Vaughton* a confirmation of the said appointment."

The plaintiff also offered in evidence the subjoi[illegible] resolution, made and signed by the defendants on [illegible] 10th of *July* 1839.

"That *Edward Thorne* be managing director of th[illegible] association for three years, and *John Vaughton*, secretar[illegible] for the same period; that the remuneration to the former be settled at some future meeting; the latter to receive 5*l.* per week, and to act under the direction of the provisional committee."

The reception of this resolution was objected to by the defendants' counsel, for want of a stamp, and also as being inadmissible to vary the terms of the agreement; but it was admitted.

The case set up on behalf of the defendants was that the defendants, previous to the 18th of *September*, discharged the plaintiff from their service; and witnesses were called, who proved that, on the 9th of *August*, *Brine* and *Bailey* intimated to the plaintiff that his services were no longer required, and that they should give up the concern altogether, as being an unprofitable speculation. It appeared that the defendant continued to attend the gardens for some time afterwards.

It was objected, on the part of the plaintiff, that the above evidence was not admissible, there being no plea of discharge upon the record.

The undersheriff, however, received it; and told the jury, that if they were of opinion that the defendants had been discharged on the 9th of *August*, their verdict

must be for the defendants; but if they thought that the discharge was conditional on the defendants' giving up the gardens, which it had been proved they still retained, they must then find for the plaintiff.

The jury having returned their verdict for the plaintiff, damages 20*l.*, *Mansel*, in last *Hilary* term, obtained a rule *nisi* for a new trial, on the grounds that the resolution of the 10th of *July* was not admissible without a stamp, and that the verdict was against the evidence. He also contended that the summing up was, in effect, a misdirection.

Bompas, Serjt. and *Humfrey* now shewed cause. The question is, whether the resolution given in evidence, which was not signed by the plaintiff, required a stamp; and it is submitted that it did not. It is not an agreement, but may be compared to a memorandum of hiring, made in a farmer's book. In *The King* v. *St. Martin's, Leicester* (*a*), in order to prove a settlement by renting a tenement under the 59 *G.* 3. *c.* 50., a witness was called, who produced a book containing the following entry, unstamped, in his handwriting: — "Agreed with *T. S.* (the pauper), to have the house in *P.*, now occupied by *W.*, at 11*l.* per annum, to be paid quarterly; quarter's notice to be given on either side; to leave in same repair as he found it." The witness stated, that he let the house as agent to the owner; and that the terms were reduced to writing to prevent mistake, and signed by the pauper's wife to bind her husband, who was not present; but there was no other signature. It was held, that the sessions not having found that the wife was authorised by the pauper, the entry was neither an agreement for a lease, nor a lease, and that the witness

(*a*) 2 *Ad. & E.* 210.; 4 *N. & M.* 202.

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might look at the entry to refresh his memory, with its being produced in evidence. And *Patteson* J. said "Taking this as an agreement, the statute imposes a stamp upon agreements under hand only, meaning such as have, *per se*, the binding effect of an agreement. It is said that there was a subsequent assent by the party taking: that, however, is not the question. Could either party have enforced his rights by the agreement? would an action have lain upon it?" So, here, this resolution does not require a stamp, for the plaintiff could not recover on it without proving that it had been acted upon by the defendants. A mere document signed by one party is not evidence of an agreement, unless it is shewn by something else that such an agreement has been made. In *Edgar* v. *Blick* (*a*), it was held that a plaintiff, who had signified, by a printed prospectus, the terms on which he was ready to engage to perform particular services, might, in an action against a party who had employed him to render those services under a parol agreement, read the prospectus in evidence to shew what the terms were, although it was not stamped.

With respect to the case set up by the defendants, that the plaintiff had been discharged, it was objected at the time, that such a defence could not be urged under the plea of non assumpsit. Independently, however, of that objection, it is clear that there was evidence from which the jury might conclude that the plaintiff had never been absolutely dismissed; and the point was properly left to the jury.

Talfourd, Serjt., and *Mansell*, in support of the rule. The resolution in question required a stamp. Upon the first agreement, the defendant must either have brought

(*a*) 1 *Stark. N. P.* 464.

his action for being improperly discharged, or have waited until the end of the year before he could have recovered his salary. The resolution, therefore, was put in for the purpose of shewing that the original agreement had been varied by another, substituting a weekly, in lieu of a yearly, salary. How, then, can it be said that the resolution is not evidence of a contract, when, but for it, the parties would appear to be acting on the first agreement? It is clear that the plaintiff had such an interest in the resolution, that a judge would have required it to be produced, in order that he might get it stamped. [*Erskine* J. Was it not a mere resolution on which an agreement might afterwards be made with the plaintiff?] This question recently arose in the Exchequer, in *The Corporation of Ludlow* v. *Charlton;* and although the point was not expressly decided, it must be admitted the court inclined to think that a resolution like the present does not require a stamp. Here, however, as the resolution professes, in terms, to engage the plaintiff for three years, and consequently, is within the statute of frauds (*a*), it must be in writing.

TINDAL C. J. The only real question in this case is, whether the resolution come to by the defendants on the 10th of *July*, is or is not an agreement, or a minute or memorandum of an agreement, within the meaning of the stamp act? The words of the statute (*55 G. 3. c.* 184. sched. part 1. *Agreement*) are, "agreement or any minute or memorandum of agreement made in *England* under hand only, or made in *Scotland* without any clause of registration (and not otherwise charged in this schedule, nor expressly exempted from all stamp duty), where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties

(*a*) Vide *post*, 366. (*a*).

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from its being a written instrument," &c. Under this clause, a document need not be a formal agreement, but may be a minute or memorandum of an agreement. With respect to the words on which the present question arises, namely, "whether the same shall be given in evidence of a contract," &c., it seems to me that the meaning of these words is, that the duty is not to be confined to cases where there is an agreement, but is to extend to all cases in which recourse is had to any writing as evidence of a contract. The document, however, must still come within the former words, "minute or memorandum of an agreement." I am of opinion that the resolution in question is not either an agreement or a memorandum of an agreement. It does not appear that the plaintiff was present when it was made, or that he was consulted with respect to it. It may have been either a proposal, or an authority to enter into a contract, or a resolution that was afterwards carried into effect, and therefore only evidence of the terms of an agreement subsequently made.

Whether or not the plaintiff was discharged from the service of the defendants, was a question for the jury, who seem on that point to have come to a right conclusion.

BOSANQUET J. was at chambers.

ERSKINE J. I also am of opinion that this is a document which does not require a stamp. It does not appear to me that the act requires that every document which may be given in evidence to shew the existence of an agreement, shall be stamped, but only such agreements, or memorandums of agreement, as would be evidence against both of the contracting parties. This resolution seems to have been come to in the absence of the plain-

tiff, and might never have been communicated to him; and although it may be evidence to shew the terms on which the plaintiff was afterwards employed, it does not amount, in itself, to an agreement. It has been contended, that as the plaintiff was to be engaged for three years, the statute of frauds required the agreement to be in writing, and, *à fortiori*, that it must be stamped. But that argument assumes the whole question, namely, that the resolution is an agreement. With respect to the question, whether or not the plaintiff was discharged, the language spoken to was very equivocal. The defendants, *Brine* and *Bailey*, send for the plaintiff, whom they have bound themselves to employ as secretary, and tell him that his services will be required no longer, not in consequence of any fault on his part, but because they intend to give up the gardens. That appears to me to mean, that when they parted with the gardens they would want him no longer. There was also some evidence that the plaintiff was employed afterwards; and it was for the jury to say whether he was employed by the defendants.

MAULE J. I am of the same opinion on both points. The stamp act requires every instrument to be stamped, which is an "agreement, or any minute or memorandum of an agreement, where the matter shall be of the value of 20*l.* and upwards." The subsequent words, "whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument," are, I conceive, used to exclude the excuse that the agreement, of which some memorandum is given as evidence, need not have been made in writing; which would, in every case not within the statute of frauds, enable a party to give in evidence a written contract without its being stamped. It is quite clear that this

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resolution did not require a stamp. It is nothing more than a memorandum, — a mere determination formed by these defendants to employ the plaintiff, which they might have rescinded, and which would not bind the plaintiff unless he consented to it afterwards.

With respect to the point, whether what passed between two of the defendants and the plaintiff amounted to an immediate discharge, or was only conditional on the gardens being given up, it was a question for the jury; and if I had been in their place, I should have come to the same conclusion upon the evidence as they have done.

Rule discharged. (a)

(a) As to cases within the fourth section of the Statute of Frauds, upon "agreements that are not to be performed within the space of one year from the making thereof," see *Peter* v. *Compton, Skinner,* 353.; *Fenton* v. *Emblers,* 3 *Burr.* 1278.; 1 *W. Bla.* 353.; *Boydell* v. *Drummond,* 2 *Campb.* 157., 11 *East,* 142.; *Bracegirdle* v. *Heald,* 1 *B. & Ald.* 722.; *Mavor* v. *Pyne,* 3 *Burr.* 285., 11 *B. Moore,* 2.; *Wells* v. *Horton,* 4 *Bingh.* 40.; 12 *B. Moore,* 176.; *Burch* v. *Earl of Liverpool,* 9 *B. & C.* 392., 4 *M. & Ryl.* 380.; *Snelling* v. *Lord Huntingfield,* 4 *Tyrwh.* 606., 1 *C. M. & R.* 20. And see 9 *Geo. 4. c.* 14.

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HALLEWELL and Another *v.* JAMES MORRELL, ROBERT MORRELL, and WILLIAM AMBROSE.

June 5.

ASSUMPSIT. The first count of the declaration stated, that the plaintiffs, before and at the time of making the agreement and promise of the defendants thereinafter next mentioned, were interested in certain collieries and other property in the said agreement advertised for sale by auction certain collieries and other property, under a power contained in certain mortgage securities, in which collieries and other property two of the defendants were, or claimed to be, incumbrancers, and that the plaintiffs, at the request of the defendants, and for the considerations after mentioned, had agreed to postpone the sale; it was (among other things) stipulated, that the accounts of the plaintiffs should be taken in the manner therein mentioned, and the amount found due to them, not exceeding 20,000*l.*, should be secured to be paid to them by the deed of covenant of the defendants, by three instalments, the first of which was to be paid at four months from the date of the agreement; that the collieries, moneys due for coals and stock of coals on the wharf should be given up to the defendants; that on payment of the first instalment the whole of the property comprised in the securities held by the plaintiffs (except the collieries) should be conveyed to the defendants; and that the deed of covenant should be forthwith prepared, and executed by all parties, within twenty-one days from the date of the agreement.

By an agreement between the plaintiffs and defendants, after reciting that the plaintiffs had

In assumpsit by the plaintiffs on the agreement, the declaration alleged that the plaintiffs were interested in the collieries and other property as mortgagees thereof, under and by virtue of certain mortgage securities, and were in possession of the collieries, and were possessed of large quantities of coal then lying upon a certain wharf, and that certain sums were due to them for coals before then sold, in which collieries and other property two of the defendants were, or claimed to be, interested as incumbrancers; and that the plaintiffs had advertised for sale by auction their *interest* in the said collieries and other property, under a *power* lawfully authorising them in that behalf, and contained in the said mortgage securities. The declaration, after setting out the agreement, assigned for breach a refusal by the defendants to execute the deed of covenant.

Held, on special demurrer, that the parties did not stand in the relation of vendors and purchasers, and that the making out of a good title to convey was not a condition precedent to the right of the plaintiffs to call upon the defendants to execute the deed of covenant.

Held, also, that the interest of the plaintiffs was sufficiently alleged; and that the allegation that the plaintiffs were about to sell their *interest* in the collieries and other property under a *power*, was not repugnant or inconsistent — the word "power" being to be understood in its popular, and not in its technical sense.

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mentioned, as mortgagees thereof, under and by virtue of certain mortgage securities before then made to them by *D. Davies* and *R. F. Cox*, and at the time of the making of the said agreement were in possession of the said collieries, and were possessed of certain large quantities of coal then lying and being in and upon a certain wharf, and that certain sums of money were then due and owing to them for the price of divers other quantities of coal before then raised and gotten in and from the said collieries, and by the plaintiffs before then sold and delivered to divers persons; in which collieries and other property in the said agreement mentioned, the defendants, *James Morrell* and *Robert Morrell*, at the time of the making of the said agreement, were or claimed to be interested as incumbrancers: That the plaintiffs were then also possessed, and the holders of certain bills of exchange, drawn for divers large sums of money, in the whole amounting to a large sum, to wit the sum of 10,000*l.*, and to which the said *William Ambrose* was a party, and as such liable (that is to say, as to some part thereof as acceptor, and as to other part thereof as indorser) to have proceedings taken against him by the plaintiffs upon the said bills: That the plaintiffs, before the time of the making of the said agreement and promise thereinafter next mentioned, had caused to be advertised for sale, and were about to put up for sale, and to sell, by public auction, on the 19th of *May*, 1838, their *interest* in the said collieries and other property in the said agreement mentioned, under a *power* lawfully authorising them in that behalf, and contained in the said mortgage securities made to them by the said *Davies* and *Cox* as aforesaid; of all which said several premises the defendants before and at the time of making the said agreement and promise thereinafter next mentioned, had notice: That thereupon afterwards, to wit on the 19th of *May*, 1838, by an agreement in writing,

bearing date, to wit, the day and year last aforesaid, and then made between the plaintiffs of the one part and the defendants of the other part, after reciting that the plaintiffs had advertised for sale that day by public auction, at the *Bell Inn*, in the city of *Gloucester*, certain collieries and other property (thereby meaning the said collieries and other property thereinbefore mentioned) under the power contained in the mortgage securities made to them by *Davies* and *Cox* (thereby meaning the said power of sale in the said mortgage securities thereinbefore mentioned) in which collieries and other property the defendants, *James Morrell* and *Robert Morrell*, were, or claimed to be, interested as incumbrancers, and that the plaintiffs had, upon the request of the defendants and for the considerations thereinafter mentioned, agreed to postpone the said sale; it was, by the said agreement, witnessed, and the parties thereto for themselves respectively and for their respective executors, administrators, and assigns, mutually and reciprocally agreed, as follows, (that is to say) the said parties thereto in the first place agreed, that the accounts of the plaintiffs including all legal and other expenses, and also the accounts of *W. Nest*, their receiver and manager of the collieries, should forthwith be made up, and if any question or dispute touching the accounts should arise, the same should be referred to *J. J.*, of, &c., a party nominated by and on behalf of all parties, and that his decision in writing should be final and conclusive: and that the defendants, in consideration of the agreement on the part of the plaintiffs to postpone the said sale thereinafter contained, agreed as follows:—that the amount to be found due on taking the said account, not exceeding twenty thousand pounds, should be secured to be paid to the plaintiffs by the deed of covenant of the defendants with the plaintiffs, in the following manner, (that is to say) one equal third part

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thereof, with interest at five per cent. per annum, on t 19th day of *September* then next ensuing, one oth third part thereof on the 19th day of *January* th next, with like interest from the day of the making the said agreement, and the remaining one third pa with like interest, from that day, on the 19th day *May*, 1839, with liberty to pay off the whole or a part of the said sum without giving any previous notic That the plaintiffs, in consideration of the premises c their part, agreed to postpone, and had postponed th said intended sale, and also agreed to give up to th defendants the said collieries, and also all moneys the due and owing for coals sold by them, with prop authority to collect the same, together with the stock coals then upon the wharf: That the said parties there agreed that the security intended to be made by th said deed of covenant should be taken as additional a collateral to the securities then held by the plaintif which were to be retained by them, but no proceedin were to be taken against the said *William Ambro* upon his bills held by them: That, on payment of th first instalment, the whole of the property comprised the securities held by the plaintiffs (except the collieric should be released and conveyed to the defendant That the said deed of covenant should be forthwi prepared and executed by all parties within twenty-o days from the date of the said agreement; in defa whereof, the plaintiffs should, if they thought proper, at liberty to proceed as if that agreement had not be made, and to retake possession of the said collieric as in and by the said agreement reference being the unto had, will, amongst other things, more fully and large appear. Mutual promises.

Averment: That the plaintiffs, in pursuance of the sa agreement and in part performance thereof on their pa did, at the request of the defendants, then, to wit,

the day and year last aforesaid, postpone the said intended sale of the said collieries and other property, and have from thence hitherto forborne to proceed therein; and that, in pursuance of the said agreement, no proceedings have been taken against the said *William Ambrose* upon the said bills, or any or either of them, but the plaintiffs have wholly abstained from taking the same: That the plaintiffs, after the making of the said agreement, to wit, on the day and year last aforesaid, did give up to the defendants the said collieries, and the defendants then had and took, and from thenceforth continually have retained, possession of the same, and also all the said moneys then due and owing for coals sold by them as aforesaid, with proper authority to collect the same, together with the said stock of coals then on the said wharf as aforesaid, according to the said agreement; and afterwards, and long before the expiration of the said twenty-one days in the said agreement mentioned, to wit, on the 30th day of *May*, 1838 aforesaid, caused to be prepared and delivered to the defendants a certain draft of a deed of covenant for securing the payment by the defendants to the plaintiffs of the sum of money, which, on the making up of the said accounts of the plaintiffs and the said *W. Nest*, in the said agreement mentioned, should be found to be due and owing to the plaintiffs upon the said accounts (a blank being left in the said draft deed of covenant for the amount of the money to be secured thereby, the said accounts not being then made up, and the time for making up the same not then having elapsed), by three instalments, &c. with liberty for the defendants to pay off the whole, or any part, of the said sum without giving any previous notice, according to the tenor and effect, true intent and meaning of the said agreement. Further averment: that the plaintiffs have always been ready and willing, upon payment of the said first instalment, to re-

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lease and convey to the defendants, according to true intent and meaning of the said agreement, whole of the property comprised in the said securi so held by the plaintiffs (except the said collieries), cording to the said agreement: and that the accou of the plaintiffs and the said *W. Nest*, in the said ag ment mentioned, were not made up within twenty-o days from the date of the said agreement, though t plaintiffs were ready and willing that they should be so made up within that period, and that the delay in maki up the same was not caused by any neglect or defau of the plaintiffs in that behalf, but by the difficulty an complexity of the same, whereof the defendants the had notice: That thereupon, in consideration of th said several premises aforesaid, and that the plaintiffs had performed and fulfilled the said agreement as afore- said, it was agreed, by and between the plaintiffs an defendants, heretofore to wit, on the day and year la aforesaid, that the said accounts should be made u within a reasonable time after the expiration of the sai twenty-one days, and that the defendants should execu the said deed of covenant, in the said agreement me tioned, within a reasonable time after the said accoun should be so made up as aforesaid: That the said a counts were afterwards, and within a reasonable ti from the expiration of the said twenty-one days, to w on &c., made up as aforesaid, whereof the defenda then had notice, and a certain large sum of mon not exceeding the sum of 20,000*l.*, to wit, the sum of 18,710*l.* 7*s.*, was then found to be due and owing to t plaintiffs upon the said accounts, and no question or dispute touching the said accounts did arise: That t plaintiffs afterwards, and within a reasonable time in that behalf after the said accounts were so made up as aforesaid, and long before the said 19th day of *September*, in the said agreement mentioned, to wi

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ne 30th day of *July* 1838 aforesaid, called upon and ired the defendants to execute a deed of covenant rding to the terms of the said agreement: That ough the plaintiffs have always been ready and ng, and have offered to accept a deed of covenant securing to them the payment of the said sum of 710*l.* 7*s.* by the aforesaid instalments, and to execute a deed of covenant according to the said agreement hat behalf as aforesaid, and to do and to perform all er things in the said agreement contained on their t and behalf, then to be done and performed accord- to the tenor, &c. of the said agreement; of all which eral premises, they, the defendants, afterwards, to , on the day and year last aforesaid had notice, and re then and within a reasonable time after the said ounts were so made up as aforesaid, and within a sonable time after the said twenty-one days, and long ore the said 19th day of *September*, requested by the intiffs to return the said draft deed of covenant to the intiffs, to enable them to procure the same to be perly prepared and engrossed, ready to be executed all the parties thereto, according to the tenor, &c. the said agreement in that behalf; and although re than a reasonable time for the return of the said ft deed of covenant, according to the terms of the l agreement, elapsed between the time at which the l accounts were so made up as aforesaid, and the l 19th day of *September* 1838; and although the de- dants have wholly neglected and refused to return said draft deed of covenant to the plaintiffs, and have reby prevented the plaintiffs from procuring the ne to be properly prepared and engrossed, and ex- ted by the proper parties in that behalf: yet the endants disregarding their said agreement, and the d promise so by them made in such behalf as afore- d, have not as yet executed any deed containing any

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covenant by them for payment of the said 18,710*l.* 7*s.*, or any part thereof, or any interest to the plaintiffs by instalments, according to th of the said agreement, or in any other manne ever, but have wholly refused and neglected so and the said sum of 18,710*l.* 7*s.*, together with thereon, at 5 per cent. from the day of mak said agreement, amounting together to the 20,000*l.* (the whole of which would, according terms of the proposed deed of covenant, ha executed by the defendants according to the t the said agreement and their said promise in tha have become due and payable from the defen the plaintiffs before the commencement of th still remain wholly in arrear and unpaid to th tiffs, and wholly unsecured to them by the de by deed of covenant, or otherwise: And reason of the premises, the plaintiffs have been d of the means of recovering the said sum of 18,' and interest thereon as aforesaid, and every part from the defendants, and have been and are prived of all security from the defendants for the

Special demurrer by the defendant *Robert* assigning the following causes — that it is not nor does it appear in or by the said first what interest the plaintiffs, at the time of mak said supposed agreement, had in the said si collieries and other property therein mentio mortgagees thereof, under and by virtue of t supposed mortgage securities in the said firs mentioned; or what the said supposed mortg curities were, or that they had any saleable or as interest or estate in the said collieries and oth perty: And, also, for that the said first count is gruous and unintelligible in this, that it is in an said first count alleged, that the plaintiffs had c

be advertised for sale, and were about to put up to sale, and to sell by public auction on the 19th of *May* 1838, their *interest* in the said collieries and other property in the said agreement mentioned, under a *power* lawfully authorising them in that behalf, and contained in the said mortgage securities; whereas, if the said intended sale was to be effected by the plaintiffs under a power lawfully authorising them in that behalf, it must have been of something else and other than their interest in the said collieries and other property, for the sale of which interest, whatever the same may have been, no mere power contained in the said mortgaged securities could be necessary, nor could the same be sold under such power in manner and form as in the first count alleged: And, also, for that it is not stated, nor does it appear in or by the said first count, that the plaintiffs, at any time before they called upon and required the defendants to execute a deed of covenant according to the terms of the said agreement as in the said first count alleged, or at any time before the commencement of this suit, made, or produced, or shewed to the defendants a good title to the said collieries and other property, or to their, the plaintiffs', supposed interest therein, or to any estate therein, or to any and what power of them, the plaintiffs, to sell, assign, or convey any and what interest or estate therein: And, also, for that it is not stated, shewn, or alleged in or by the said first count that the plaintiffs, at the time of making the said agreement, or at any time afterwards, and before the commencement of this suit, had a good title to, or had, or were lawfully possessed of, any certain interest or estate in the said collieries, or, that at the time of making the said agreement, they were in lawful possession of the said collieries, or that their supposed possession thereof in the said first count mentioned was any other than a mere naked possession in fact, without right or title to

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the same, or a possession without any continuing interest or estate in the same. Joinder in demurrer.

Stephen Serjt. (*George* was with him) in support of the demurrer. The first objection to this declaration is the want of certainty. A party may set out a contract either in its precise terms, or according to its legal effect. (*a*) Here the plaintiffs have chosen the latter mode, and they were bound to state the contract in an intelligible manner. There is neither a description of the estate which the plaintiffs had undertaken to convey, nor is it sufficiently shewn what was the nature or extent of their interest therein: all that is alleged is that they were mortgagees. (*b*) It is then stated that the defendants *James* and *Robert Morrell* were, or claimed to be interested as incumbrancers, but whether prior or subsequent to the plaintiffs, does not appear. Neither is it shewn what connection exists between the *Morrells* and *Ambrose*, and why the plaintiffs were to forbear to sue the latter. This is the second attempt the plaintiffs have made to state this agreement intelligibly, having about a year ago brought an action upon it in the Exchequer. The declaration in that case was the same as the present, except that it contained no introductory allegations of interest. It was held bad, but the plaintiffs had leave to amend. Instead, however, of doing so they abandoned their action in that court, and have come here with a declaration, which is a mere colourable conformity with such decision; for the allegations now introduced cannot suffice to make the declaration good.

There are two essential conditions which are implied in every contract of sale, the one that the vendor has a

(*a*) *Vide antè*, 281 (*d*).

(*b*) As to the nature of the interest of mortgagees, see 3 *Mann. & Ryl.* 110 *n.*

good title to the property sold, and the other that he shall exhibit his title to the purchaser, which is generally done by the delivery of an abstract. There is nothing here to discharge the plaintiffs from the necessity of averring that they had, and made out, a good title. If it would be a good plea for the defendants to say, that the plaintiffs had no title, it is submitted that the want of an allegation of title is fatal to the declaration. It was requisite for the plaintiffs to aver that they had a good title, and although it might not be necessary for them to allege a seisin in fee, as it does not appear that they undertook to sell the fee, they should have stated what the nature of their interest was, and whether they had the fee, or merely a term of years, in the property. [*Tindal* C. J. This action is for a breach of the defendants' contract to execute a deed of covenant. You are leaping before you come to the bar.] The defendants cannot be called upon to execute the deed of covenant, by which they undertake to pay 20,000*l.* until the plaintiffs shew that they have a good title; for if the defendants were to execute such deed, it is apprehended it would then be too late for them to object, that no title had been exhibited. Independently of the general principle that a vendor should make out a good title, it is incumbent upon these plaintiffs to do so, the consideration for the agreement by the defendants being that the plaintiffs would postpone the intended sale. If, therefore, they had no interest to sell, the agreement is without consideration. *Jones* v. *Ashburnham* (*a*), and *Head* v. *Baldrey* (*b*) are in point. *Luxton* v. *Robinson* (*c*) establishes the principle, that a plaintiff in a case like the present must allege that he has an assignable interest. [*Erskine* J.

(*a*) 4 *East*, 455.
(*b*) 6 *A. & E.* 459.
(*c*) 2 *Dougl.* 620 *a.*

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In that case there was no allegation that the plai had *any* interest in the premises.] Here the plaintiff not say they have any assignable interest. In the *L of St. Albans* v. *Shore* (*a*), it was laid down by L *Loughborough*, that "where a man undertakes to c vey, he undertakes to convey by a good title." S *Phillips* v. *Fielding* (*b*), which was an action brough a vendor against a purchaser, for the non-perform of the conditions of sale of a copyhold estate, it was h that it was not sufficient to state in the declaration the seller had been always ready and willing, and frequently offered to make a good title to the est and to make a proper surrender on payment of the p chase-money; but that the declaration ought to h averred, that the seller actually made a good title surrendered the estate to the purchaser, or a ten and refusal, and also to have shewn what title seller had. [*Coltman* J. The two last cases mus considered of doubtful authority, since the deci in *Martin* v. *Smith*. (*c*)] They have been over-r only to the extent that the plaintiff need not set his whole title on the record. *Martin* v. *Smith* sh that the declaration must contain a general a ment that the plaintiff has a good title. *Hawkin Kemp* (*d*) is to the same effect. [*Erskine* J. it not be time enough for the plaintiffs to make a good title when they are bound to convey?] defendants cannot be expected to bind themselve pay 20,000*l*., before they know whether the plai can make out a good title. [*Tindal* C. J. W called upon to pay the money they may raise the defence they seek to set up now. Have you any thority, that where the contract is silent with respe

(*a*) 1 *H. Bl.* 270.
(*b*) 2 *H. Bl.* 123.
(*c*) 6 *East*, 555.; an 8 *Taunt.* 67.
(*d*) 3 *East*, 411.

the plaintiff's making out a good title, the objection arises on the face of the declaration?] It is submitted that both the having, and the making out of, a good title are conditions precedent, which are to be implied in cases like the present. In *Souter* v. *Drake* (*a*) it was held, that in every contract for the sale of an existing lease there is an implied contract by the seller (if the contrary be not expressed) to make out the lessor's title to demise; and without shewing such title the seller cannot maintain an action at law against the buyer for refusing to complete the purchase. It was there contended, that it was to be inferred from the short residue of the term and other circumstances that the parties intended to waive the question of title; but the court said, that "it would be dangerous to defeat the general rule by speculations on the possible intentions of parties." So here there is no ground, but conjecture, for saying, that the defendants intended to take whatever interest the plaintiffs had; and, if the latter meant to contend that such was the intention of the defendants, the declaration should have contained an allegation to that effect, and then the defendants might have taken issue upon it in point of fact. *Roper* v. *Coombes* (*b*) also shews that a man is not bound to pay money under a contract for sale, before he is satisfied that the vendor can make out a good title to the property sold.

Secondly, the declaration avers that the plaintiffs had advertised and were about to sell their interest in the collieries and other property, under a power authorising them in that behalf. This is a repugnant and inconsistent allegation, affecting one of the considerations on which the contract is founded. A man cannot have both a fee and a power to sell the fee; and if this be

(*a*) 5 *B. & Ad.* 992.; 3 *N. & M.* 40.

(*b*) 6 *B. & C.* 534.; 9 *D. & R.* 562.

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true of a fee, it is also true of a less estate. In *Goodill* v. *Brigham* (*a*), where there was a devise in fee to a *feme covert*, with a power to dispose of the estate without the control of her husband, it was held, that the power was void as being inconsistent with the fee given her in the first instance, and that she could not convey without a fine. A power necessarily implies something different from an interest; and consequently there is no sufficient allegation of interest in the plaintiffs, as it is impossible to see, upon the declaration, whether they have an interest or a power. Repugnancy has always constituted an objection on special demurrer; *Butt's Case* (*b*), *Denison* v. *Richardson*. (*c*) In the latter case the declaration was held bad simply on the ground of a repugnancy in the dates.

Talfourd Serjt., *contrà*, was stopped by the Court.

TINDAL C. J. The first objection made in this case is, that the declaration is bad, for not containing an allegation that the plaintiffs had good title to convey the collieries and other property mentioned in the agreement. The argument has proceeded on an assumption that the situation of the plaintiffs and the defendants is similar to that of the vendor and purchaser of an estate. It appears to me, looking at the record, that the parties do not stand in that relation, and consequently the authorities which have been cited do not apply. This is not a contract by which the defendants agree to pay the purchase-money to the plaintiffs on having a conveyance of the estate; but it is a contract by which the defendants undertake, within a certain time, to execute

(*a*) 1 *B. & P.* 192.
(*b*) 7 *Co. Rep.* 23 *a.*
(*c*) 14 *East*, 291.

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a deed of covenant. The relation of these parties to the estate is this: the plaintiffs are mortgagees in possession of certain collieries, out of which they have worked coal, in respect whereof debts to a considerable amount are due to them. The defendants also are, or claim to be, incumbrancers upon the property. It was, therefore, greatly to their interest to obtain possession of the plaintiffs' mortgage, in order to tack it to their own, and thus acquire a priority. (*a*) This being the situation of the parties, the plaintiffs advertise for sale by auction their interest in the collieries, under the power contained in the mortgage securities. The sale being about to take place, the defendants naturally wish to prevent it, and therefore come to an agreement with the plaintiffs, by which, in consideration of the sale being postponed, they undertake to enter into a deed of covenant (which was to be executed by all parties within twenty-one days from the date of the agreement) for the payment of the amount found due to the plaintiffs, on taking an account in the manner therein set forth, not exceeding 20,000*l.*, by three equal instalments, on the 19th of *September*, the 19th of *January*, and the 19th of *May* then next ensuing the making of the agreement, which bore date on the 19th of *May* 1838. And it is stipulated that on payment of the first instalment, all the property comprised in the securities held by the plaintiffs (except the collieries) shall be conveyed to the defendants; and that in the mean time, and previously to the deed of covenant being executed, the latter shall have given up to them the collieries, all moneys then due for coals, with authority to collect the same, and the stock of coals upon the wharf; and further, that the plaintiffs shall forbear to take proceedings against

(*a*) *Vide Coote's Law of Mortgage*, 2d ed. 471.

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Ambrose upon his bills held by them. The defendants consequently obtain an important advantage immediately upon the execution of the contract. The declaration proceeds to allege that, in pursuance of the agreement, the plaintiffs had postponed the intended sale, and had taken no proceedings against *Ambrose*, and had given up the collieries to the defendants, and also the moneys then due for coals sold, with a proper authority to collect the same, and the stock of coals upon the wharf; and that they had prepared, and delivered to the defendants, a draft of a deed of covenant, and, the accounts having been made up, had called upon them to execute a deed of covenant, and to return the draft in order that it might be engrossed; but that the defendants had refused to execute such deed of covenant. The defendants do not deny the facts stated in the declaration: the only answer they set up is a demurrer, assigning for cause, that it is not alleged in the declaration that the plaintiffs had a good title to the collieries and other property, or any power to sell or convey the same. I have said enough to shew that the relation in which the parties stood did not impose on the plaintiffs the duty of making out their title before the execution of the deed of covenant — that the exhibiting of such title was not a condition precedent to their right to call upon the defendants to sign that deed. The fair construction of the agreement is, the defendants were so anxious to prevent other parties from coming in before them, that they were content to place themselves in the very boat in which the plaintiffs were sailing. Whether the defendants may hereafter take advantage of the want of a good title in the plaintiffs, is another question: it is sufficient now to say, that the making out of a good title was not a condition precedent to the right of the plaintiffs to require the execution of the deed of covenant.

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Another objection is, that the declaration is repugnant and incongruous, by reason of its stating that the plaintiffs were about to sell their interest under a power, so as to leave it uncertain whether the intended sale was to be of their interest in the property, or it was to be effected by virtue of some power. I think we should be construing these words much too strictly, if we were to read them in the sense which would be attached to them by a conveyancer. Interpreting the language of the declaration according to the subject matter, and referring the one expression to the real, and the other to the personal property, full force and effect may be given to both. The declaration commences by alleging that the plaintiffs were interested in certain collieries and other property, which other property we subsequently find consists of debts and coals, and consequently the word "interested" in the first allegation is clearly referable to both real and personal property. Afterwards comes an allegation that the plaintiffs were about to sell their interest in the collieries and other property, under a power lawfully authorising them in that behalf. Why are we to say that the plaintiffs meant the power of sale to extend to something to which it is not legally applicable? According to all the authorities, there is not the same precision required in a declaration as in a plea. "Words shall have a reasonable intendment and construction:" *Com. Dig. Pleader*, (C. 25.) "And general words are sufficient where the certainty lies within the defendant's notice." (C. 26.) Here the defendants are parties to the agreement, and it is alleged that they had notice of the power of sale. I am therefore of opinion that neither of the objections urged to this declaration ought to prevail. We are not to be governed by the decision in the Exchequer, for there the declaration did not contain the allegations which are here introduced.

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COLTMAN J. I also am of opinion that the out of a good title is not a condition preceden right of the plaintiffs to call for the executio deed of covenant. The cases cited are very from the present. Here, it is stipulated that the shall give up the collieries, debts, and stock of hand, to the defendants; shall forbear to proce *Ambrose* upon his bills; and shall postpone the sale: all of which formed a very good consider the execution of the deed of covenant by the de Whether the plaintiffs can call upon the defen pay the instalments when due, without first ma a satisfactory title, is a very different question, not necessary to decide that now. There is n why the exhibiting of a good title should be a c precedent to the execution of the deed of cove the latter is nothing more than the giving a sec the payment of the money when a proper conv made.

Another objection is, that there is a repugn inconsistency on the face of the declaration i that the plaintiffs were about to sell their intere a power. There certainly would be an incon were we to take the word power in its strict sense; but we are not bound to do so; and gi word its popular meaning, there is nothing inc in the allegation. Where the making out of a is a condition precedent, the allegation migh sufficient, but for the purposes of this pres I conceive it is.

ERSKINE J. The first objection made by fendants to this declaration is, that it does what interest the plaintiffs had in the collie other property at the time when the agreement w But no authority has been produced, that parti

situation of the plaintiffs are bound to shew precisely what their interest is. Then it is said, that it is not alleged what the mortgage securities were; but it could not be necessary to set out the nature of those securities, and whether the plaintiffs were mortgagees in fee, or for a term of years. It is then objected, that the declaration does not state that the plaintiffs had any saleable or assignable interest in the property. It alleges, however, that the plaintiffs were interested in certain collieries, and other property, as mortgagees, under certain mortgage securities, and were in possession of the collieries, and were possessed of certain large quantities of coals, &c. That appears to me to be a sufficient allegation, that the plaintiffs had a saleable or assignable interest in the property, and distinguishes this case from that in the Exchequer, in which there was no allegation that the plaintiffs had any interest whatever. A further objection is, that it is not averred that the plaintiffs produced, or had before the commencement of the suit, a good title to the collieries or other property, or were possessed of any certain interest in the collieries. If the making out of a good title were a condition precedent, the declaration, upon the authorities cited, undoubtedly would be bad. But I do not see how it can be said, that the exhibiting of a good title was a condition precedent to the execution of the deed of covenant; for by the agreement possession of the collieries was to be given to the defendants immediately, and as a security, — having such possession given to them,—the defendants were to execute the deed of covenant within twenty-one days. The conveyance of the property (except the collieries) was not to take place when the deed of covenant was executed, but was to be made on payment of the first instalment. It is therefore clear, that the parties contemplated that the property should not be conveyed until some time after

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the execution of the deed of covenant. Then had the plaintiffs until nearly the time of making the c veyance to exhibit their title? I do not say, suppos the defendants had pleaded, that the plaintiffs had a good title, that such a plea might not have been answer to the action. But the question is, whether making out of a good title is a condition precedent as to render it necessary for the plaintiffs to aver it their declaration. It appears to me the argument failed to shew that such an allegation was requisite.

It is then said that the declaration is incongruous unintelligible, by reason of its being alleged, that plaintiffs were about to sell their interest under a pow inasmuch as a man who has an interest does not requ a power to enable him to sell. I agree, however, w what has already been said — that we are not bound construe the language of the declaration so strictly to make it inconsistent, and that if we can avoid do so by taking the words in their popular sense, we ou so to understand them. On the whole it seems to that the advantages obtained by the defendants' gett possession of the collieries, and otherwise, form a su cient consideration for their undertaking to execute deed of covenant, and that none of the objections ta to the declaration can be sustained.

MAULE J. I also am of opinion that the declarat is good. The cases which have been cited were cases of sale. Where a man contracts to sell prope *primâ facie* he contracts to sell the fee-simple. So man agrees for the sale of a lease for an unexpired t of forty years, he undertakes to sell a valid lease for period of time. In those cases the vendor cannot cover the price, unless he can make out a good titl that which he has contracted to sell. Here, howeve appears upon the agreement that the plaintiffs were

absolutely entitled to the property, but that they had some interest in it by virtue of certain mortgage securities. The agreement then goes on to state that the defendants were or claimed to be incumbrancers of the property, which also negatives any presumption that the plaintiffs were contracting for an absolute sale. Throughout the agreement, the term "sale" is never used. It appears that the plaintiffs had a power of sale under their mortgage securities. If they had put the property up to auction in pursuance of such power, they would have been bound to sell it on the usual terms. The defendants wished to get possession of the property which they could not obtain by purchase under the power of sale, without paying the price of the whole estate. They therefore, go to the plaintiffs, and agree that in case the latter will postpone the intended sale, they will within twenty-one days execute a deed of covenant to pay them by three instalments, whatever sum should be found due to them on taking the account. That shews that the intended subject of the contract was not the whole estate, but only the plaintiffs' interest therein. It is therefore clear, that cases of contracts of sale are not applicable; and that the objection, which arises from confounding the present case with those authorities cannot be supported.

It is then objected that the allegation of the plaintiffs being about to sell their interest under a power, is repugnant and inconsistent, inasmuch as conveyancers understand a power as being a very different thing from an interest in an estate. I do not think we are bound to construe this record in such a narrow sense; but that we ought to give to the word "power" its ordinary signification, and read the allegation as averring that the plaintiffs were about to sell the property by virtue of some authority which they possessed. Moreover, as the agreement includes both real and personal property, we

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may, if we choose to give to the word its strict t meaning, understand it to refer only to such p as might be sold under a power of sale.

Judgment for the p

June 10.

CHAPMAN *v.* DAVIS.

A rule to plead may be entered before the delivery of the declaration, provided that both acts are done on the same day.

TALFOURD Serjt., on a former day in this te obtained a rule *nisi* to rescind an order m *Bosanquet* J. at chambers, to set aside the ju signed in this case for irregularity.

A rule to plead was entered at the rule offic three o'clock on *Saturday*, the 23d of *May*. At o'clock on the same evening a declaration was d to the defendant, with a demand of plea. On th a summons for time to plead was served on th tiff's attorney, who indorsed, on the original su a consent for a week's time to plead, pleading i No order for time to plead having been serv plaintiff, at half past eleven o'clock on the mor the 28th, signed judgment for want of a plea. At o'clock the order for time to plead was tender was refused.

Channell Serjt. now shewed cause. It was cle irregularity to enter the rule to plead before de the declaration; *Bennett* v. *Smith*. (*a*) The dec not having been served till six o'clock in the eve *Saturday*, the 23d of *May*, no rule to plead cou perly be given until the 26th, inasmuch as the 2

(*a*) 3 *New Cases*, 305.; 3 *Scott*, 673.

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kept as the Queen's birthday (*a*); and if so, the judgment was, in every point of view, signed too soon.

Secondly, the judgment was signed against good faith, after the consent, indorsed on the summons, that the defendant should have a week's time to plead. It will be said on the other side, that no order for time was drawn up and served before the judgment was signed; but as there is no rule requiring such an order to be drawn up within twenty-four hours from its being obtained, the service of it at twelve o'clock on the morning of the 28th was in sufficient time.

Talfourd Serjt., in support of the rule. *Aikman* v. *Conway* (*b*) is an express authority to shew, that there is no irregularity in entering a rule to plead before delivering the declaration, so long as both acts are done on the same day. The judgment of the court there went on the ground, that the court will not inquire at what hour each act was done. And it was said by *Alderson* B., "It is a good rule, that when two things are done on the same day, that shall be presumed to have been done first, which ought to be so." (*c*)

With respect to the consent for time to plead given by the plaintiff's attorney, it became inoperative by reason of no order for time having been drawn up. According to what is contended for on the other side, if a party does not proceed to draw up the order, he will get all the benefit of the consent without being bound by the terms on which it was given, which were to plead issuably. [*Erskine* J. There is nothing to shew that

(*a*) But see *Wilkinson* v. *Britton*, *post*, which decides in effect that the offices were improperly closed on the 25th of *May*.

(*b*) 3 *M.* & *W.* 71.

(*c*) As to the fraction of a day, see *D'Obree*, *ex parte*, 8 *Ves.* 82.; *Sadler* v. *Leigh*, 4 *Campb.* 195. 197.; *Thomas* v. *Desanges*, 2 *B.* & *Ald.* 586.; *Farquhar*, *Ex parte* 1 *Mont.* & *Mac.* 7.; *Manning's Proceedings in Courts of Revision*, *Appendix*, X. note (*c*); *Godson* v. *Sanctuary*, 4 *B.* & *Adol.* 255., 1 *Nev.* & *M.* 52.

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the defendant accepted the terms on which the for time to plead was given.] As regards t within which an order by consent for time should be drawn up, it is quite clear, that if drawn up before the time at which the pl entitled to sign judgment, he has a right to that the defendant will not accept the consent t terms offered.

TINDAL C. J. This case cannot be distin from *Aikman* v. *Conway;* but, as the defendant s merits, the rule may be made absolute on pay costs.

Per Curiam.

Rule absolute acc

June 17.

JEVES *v.* HAY.

The defendant having obtained a rule to set aside a judge's order for irregularity, which was drawn up without mentioning costs, the plaintiff consented to its being made absolute.

IN this case a second summons for particular defendant's set-off was obtained on the 2 and duly served upon his attorney, who had o attend a prior summons which had been taken the 21st. The attorney not having attended th summons, *Bosanquet* J., on the 29th *May*, made for particulars.

Bompas Serjt., on a former day in this term, o rule *nisi* to set aside the judge's order, upon th

The defendant, however, stating that he had abandoned the first rul a second for setting aside the order with costs.

The court, after intimating that they would not have granted the s if they had been aware of the offer of the plaintiff, made the second lute, the costs to be costs in the cause.

that the summons on which the order was founded, was entitled in a cause of "*Jones* v. *Hay*." This rule was drawn up without reference to costs; but *Wilde* S. G., on a subsequent day, (and after the defendant's attorney and his counsel had been informed of the plaintiff's consent to the rule being made absolute,) obtained a second rule, calling on the plaintiff to pay the costs of the application, it being intimated to the Court that the former rule had been abandoned.

Talfourd Serjt. now shewed cause. If the second rule is to be considered as an original application, the former having been abandoned, it is too late, not having been obtained until the 1st *June*, eight days after the judge's order was made. In *Fynn* v. *Kemp* (*a*), a motion to set aside the proceedings after the lapse of seven days was held to be too late. No one could be misled by the mistake in the order.

Bompas Serjt., in support of the rule. Although the first rule was moved for irregularity, it was not so drawn up; and, consequently, the second rule was obtained on that ground after laying the facts before the Court. It is sworn by the defendant's attorney, that he was misled by the mistake in the names of the parties, and that he was not aware the summons had any reference to the present cause.

TINDAL C. J. After the plaintiff had consented to the first rule being made absolute, it was rather bold in the defendant's attorney to apply for the second rule. If we had known the offer made by the other side, we should not have granted that rule; however, it may be made absolute, the costs to be costs in the cause.

Per Curiam.

Rule absolute accordingly.

(*a*) 2 *Dowl. P. C.* 620.

June 2.

The Company of Proprietors of the Surrey Canal *v.* Hall.

By the 41 *G.* 3. *c.* xxxi. *s.* 66., the incorporated Company of the Proprietors of the Grand *Surrey* Canal were required to make and maintain bridges over the canal for the use of the owners and occupiers of adjoining lands, and also where the canal was carried common highway, public bridleway or footpath.

TRESPASS. The declaration stated that c on, &c., with force and arms, &c., b entered a certain close of the plaintiffs, being then erected and placed over and across a cert called the Grand *Surrey* Canal, situate, &c.; by himself, and with a certain horse and cha travelled, and passed in, upon, and over the s without the leave or licence, and against the w plaintiffs.

Plea, that before and at the time when, &c. t and of right ought to have been, a certain con

In 1804, the company erected a swivel bridge at a spot where t public bridleway, and footpath, which bridge, as a carriageway, wa to be for the exclusive accommodation of the tenants of an adjoin called the *Rolls* estate. From 1810 to 1822, the public occasionall bridge with carriages. In 1822, a church was built near to the canal, a formed, and the neighbourhood became very populous. From 182 the bridge was used by the public as a carriageway without interru 1832, the company began to exact a toll from persons, not tenants of estate, crossing the bridge with carriages, and in 1834, they removed bridge, and built a stone bridge in its stead.

In trespass by the company against the defendant for passing along with a horse and chaise, without the leave of the company; the j reading the evidence of the jury, told them that, supposing the brid tion to have been originally built, as a carriageway, for the exclusive dation of the tenants of the *Rolls* estate, still if in consequence of the company, an idea grew up in the minds of the public that they inten dicate the bridge to the public use, such acts would amount to a dedic

Held, taking all the summing up together, that there was no mis and that the evidence warranted the jury in finding that there h dedication.

Held also, that there was nothing in the constitution of the company nature of their property, to prevent them from dedicating the bridge t to the public.

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public highway, into, through, over, and along the said close, in which, &c., for all the liege subjects, &c. to go, pass, and repass on foot, and with horses, chaises, cattle, and carriages, at all times of the year, &c., — with a justification under such right of way.

Replication traversing the right of way, and issue thereon.

The cause was tried before Lord *Denman* C. J., at the last Summer assizes for the county of *Surrey*.

By the 41 *G.* 3. *c.* xxxi., incorporating the plaintiffs under the name and style of The Company of Proprietors of the Grand *Surrey* Canal, it was enacted, (sect. 66.) "That the said company of proprietors shall, at their own costs, (within six calendar months next after any part of the said canal, its branches, collateral cut or cuts, and towing paths thereto belonging, shall be dug out and formed,) divide and separate, and keep constantly divided and separated, the towing paths on each side of the said canal, its branches, collateral cut or cuts, and the trenches, feeders, or passages hereby authorized to be made on such part or parts thereof respectively, (as shall be deemed necessary by any three or more justices of the county of *Surrey* or *Kent*, in case there shall be any doubt or dispute about the same,) from the adjoining lands or grounds, by posts and rails, hedges, ditches, trenches, banks or other fences sufficient to keep off sheep and other cattle; the same to be set out and made on the lands or grounds which shall be purchased by, conveyed to, or vested in the said company of proprietors as aforesaid; and the said company of proprietors shall, at their own proper costs and charges, from time to time maintain and support the said towing paths, and the said posts, rails, hedges, ditches, trenches, banks, and other fences so set up and made as aforesaid; and also shall, at their own like costs and charges make up, erect, and set up, and

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from time to time maintain and support, such and so many convenient gates and stiles in, over, and through all the hedges and fences to be by them so made on the sides of such towing paths as aforesaid, *and also all such bridges, fording places, arches, culverts, and passages over, under, or by the side of, or into the said canal* or collateral cut, and the feeders, trenches, and aqueducts communicating therewith, and the towing paths on the sides thereof, of such dimensions and in such manner as any three or more justices of the peace for the said counties of *Surrey* or *Kent* shall from time to time deem necessary and direct and in case there shall be any dispute about the same, *for the use of the owners and occupiers of the lands and grounds, tenements, or hereditaments adjoining to such canal, its branches, collateral cut or cuts, and other works, or any of them respectively;* and the said company of proprietors shall not make the said canal its branches, collateral cut or cuts, or any trench or watercourse belonging to the same, in or across, *any common highway, public bridleway or footpath,* until they shall at their own proper costs and charges have made and perfected *such bridge or bridges, fording place or fording places, passage or passages, arch or arches, over, across, or under the same highway, public bridleway, or footpath,* of such dimensions, and in such manner as they the said three or more justices of the peace for the said county of *Surrey* or *Kent* shall from time to time deem necessary and direct, not being contrary to the true intent and meaning of the act; and all such gates, stiles, *bridges,* arches, fording places and other works and conveniences to be made as aforesaid, shall from time to time, and all times hereafter be supported, maintained, and kept in sufficient repair by the said company of proprietors," &c.

By sect. 68. "If any swivel-bridge or draw-bridge shall be laid over or across the said canal, its branches,

collateral cut or cuts, trenches or passages to be made by virtue of this act, all and every person or persons opening such draw-bridge or swivel-bridge shall, and he, she, and they is and are hereby required and directed, so soon as any vessel shall have passed any such bridge, to shut and fasten the same, (*except such bridges as may be erected for the private use of any owner or owners of any lands, tenements, or other hereditaments;*) and every person neglecting so to do, or wilfully opening any such swivel-bridge or draw-bridge when no vessel is to pass through the same, shall forfeit and pay for every such offence any sum not exceeding 20*s.*; and in case any such bridge shall be left open longer than necessary for the passage of any vessel as aforesaid, through the neglect or carelessness of any person belonging to any such vessel, then the master or owner of such vessel shall forfeit and pay for every such offence any sum not exceeding 40*s.*; one moiety of which said respective penalties shall go to the informer."

After the passing of the act in 1801, the canal was commenced, and being carried in its progress through lands belonging to one *Rolls*, over which there was a foot and bridle way, it became requisite in pursuance of the act to erect a bridge over the canal at the spot where it crossed such way. A swivel or swing bridge was accordingly built by the company in 1804. From 1810 to 1822, the public occasionally used the bridge as a carriageway. In the latter year a church was built near to the canal, and streets were formed leading to the bridge, which were repaired by the parish, and the neighbourhood became very populous. From 1822 down to 1832 the public used the bridge as a carriageway, without any other interruption than was caused by the bridge being swung back to allow vessels to pass. In 1832 the company began to exact a toll from all persons using the bridge with carriages who were not

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tenants of the *Rolls* estate. In 1834 the company removed the swivel bridge, and erected a stone bridge in its stead.

The above evidence having been given by the defendant, on whom the issue lay, it was contended on the part of the plaintiffs that such evidence did not shew a dedication of the bridge to the public; that inasmuch as the company was bound by the sixty-sixth section of the act of parliament, to erect a bridge over the canal for the use of the tenants of the *Rolls* estate, as a carriageway, the public must be presumed to have known the statute being a public act, that there was no original intention on the part of the company to dedicate it to them; and *Barraclough* v. *Johnson* (*a*) was cited to shew that the question was one entirely of intention.

The Lord Chief Justice, having asked the plaintiff's counsel if they could contradict the evidence given on behalf of the defendant, and received a reply in the negative, said he would leave it to the jury, that there was evidence of a dedication. After going through the evidence, and reading the following passage from the summing up of Lord *Ellenborough* in *Rex* v. *Lloyd* (*b*), "If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public;" his Lordship told the jury, that supposing the bridge in question to have been originally built, as a carriageway, for the exclusive accommodation of the tenants of the *Rolls* estate, still, if in consequence of the acts of the

(*a*) 8 *A. & E.* 99.; 3 *N. & P.* 233.

(*b*) 1 *Campb.* 260. And see *Rex* v. *Inhabitants of Surrey*, 2 *Campb.* 455.; *Rex* v. *Inhabitants of Cumberland*, 6 *T. R.* 194. *S. C. in error*, 3 *Bos. & Pull.* 354.; *Daniel* v. *North*, 11 *East*, 372.; *Trustees of Rugby Charity* v. *Merrywether*, 11 *East*, 375. n.; *Rex* v. *Barr*, 4 *Campb.* 16.

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ın idea grew up in the minds of the public, ntended to dedicate the bridge to the public acts would amount to a dedication. The jury ınd their verdict for the defendant,

', in *Michaelmas* term last, obtained a rule new trial, on the ground of misdirection; ʒ that the proper question for the jury was, not had grown up in the mind of the public, but he company had intended to dedicate the the public.

ll Serjt. and *M. Chambers*, now shewed cause. was properly submitted to the jury, for the of dedication was in substance left to them. s ample evidence to justify the Lord Chief leaving that question to the jury, and to war- ı in finding their verdict for the defendant. previously to the making of the canal, there was t and bridle way across the *Rolls* estate, and the lge erected over the canal was originally made, iageway, for the use of the tenants of that :t there was proof of the occasional user of the the public with carriages from the year 1810 In the latter year the church was built, and : period down to 1832 a continued user of e was shewn, subject only to the temporary on caused by the passing of barges along l. *The King* v. *The Inhabitants of St. Be-*, which was cited when this rule was moved stinguishable from the present case. In that ighway was presented for non-repair, and it that there was no evidence that the parish iesced in the dedication of the road to the

(*a*) 4 *B. & Ald.* 447.

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public; whereas here there can be no doubt of such acquiescence, inasmuch as the parish repaired the streets leading to the bridge in question. [*Maule* J. It was decided in *The King* v. *The Inhabitants of Leake* (*a*), that the inhabitants of a parish are bound by law to repair all roads within it dedicated to and used by the public, although there be no adoption of such roads by the parish. *Parke* J., in delivering his judgment in that case, dissents from the doctrine laid down by Mr. Justice *Bayley*, in *The King* v. *The Inhabitants of St. Benedict.*] In *Barraclough* v. *Johnson* (*b*), Lord *Denman* himself lays it down, that a "dedication must be made with an intention to dedicate." It cannot therefore be supposed that his Lordship could treat the present case, and particularly when he had *Barraclough* v. *Johnson* before him, as if the intention of the plaintiffs were immaterial. The term "dedication" of itself implies that an intention to dedicate must be made out. Such an intention must be gathered from the acts of the party. The Lord Chief Justice did not withdraw the question of dedication from the jury, but in substance left it to them to say, whether an intention to dedicate was not to be inferred from the acts of the company; and there was ample evidence to justify the jury in coming to that conclusion. In *Harper* v. *Charlesworth* (*c*), *Bayley* J. told the jury (*d*), to find for the defendant, if the user of the way had been with the assent of the crown, the owner of the soil; otherwise for the plaintiff. So here, if the jury were of opinion that the use was with the acquiescence of the plaintiffs, they were warranted in finding their verdict for the defendant. It

(*a*) 5 *B.* & *Ad.* 469.; 2 *N.* & *M.* 583.; and see *The King* v. *Edge Lane*, 4 *A.* & *E.* 723., 6 *N.* & *M.* 81.

(*b*) 8 *A.* & *E.* 99.; 3 *N.* & *P.* 233.

(*c*) 4 *B.* & *C.* 574.; 6 *D.* & *R.* 572.

(*d*) 4 *B.* & *C.* 577.

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was said at the trial, that the act of parliament was notice to the public, that there was no intention on the part of the company to dedicate the road to the public. It is apprehended, however, that this case cannot be distinguished from the ordinary one, of a person having an occupation-way over his land, which he permits the public to use. A private person would undoubtedly have been bound by the evidence of user here given, and there is no reason why this company who have permitted the bridge to be used, and the owners of the adjacent lands to build houses, and the parish to repair the roads leading to the bridge, under the belief that it was a public one, should not be held to have had an intention to dedicate it.

The occasional interruption of the way caused by the traffic on the canal, does not rebut the presumption of an intention to dedicate, although it was a circumstance to be taken into consideration by the jury, and might call for stronger evidence to shew a dedication. Instances of public thoroughfares, during certain hours of the day, are not uncommon in *London*; here the interruption was not an exception of any definite period of time.

Thesiger, and *Shee* Serjt., in support of the rule. The summing of the Lord Chief Justice was, in effect, a misdirection, for it withdrew the attention of the jury from the proper question for their consideration, namely, whether the evidence warranted them in inferring an intention on the part of the company to dedicate the bridge to the public. It ought to have been distinctly put to the jury, whether the company had any such intention. In *Barraclough* v. *Johnson*, his lordship says, "A dedication must be made with an intention to dedicate. The mere acting so as to lead persons into the supposition that the way is dedicated, does not amount

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to a dedication, if there be an agreement which explains the transaction." So here, the acts of the company are explained by the act of parliament, which rebuts the inference that they had any intention to dedicate. The statute, of which, being a public act, the public must be presumed to have been cognizant, compelled the company to erect the bridge for the use of the tenants of the *Rolls* estate, and consequently there could be no intention to dedicate it at that time. In *Roberts* v *Karr* (*a*), where a bar had been placed across the street but was soon knocked down, after which the street was used as a thoroughfare; *Heath* J. said, that the putting up of the bar rebutted the presumption of a dedication to the public. Here, the bridge was originally a swivel bridge, and the passage along it subject to perpetual interruptions, consequently there was no necessity to erect a bar. [*Erskine* J. The legislature does not seem to have contemplated that swivel-bridges would cause any serious interruption, for it authorised them to be made across public highways.] But only on condition that they were closed immediately after vessels had passed, whereas, with respect to the bridge in question, the company were not compelled to shut it, so far as the public were concerned. The 68th section of the act recognises an important distinction between public and private bridges; and it is clear that the company had a right, under that clause, to keep the bridge swung back till some party entitled to use it required that it should be closed. The interruptions, therefore, to the passage along the bridge, would not only be constant, but very probably of considerable duration. If the plaintiffs had been interested as private individuals, their acts might possibly have amounted to a dedication. [*Tindal* C. J. Why might not this company dedicate the bridge? They might be answerable over

(*a*) 1 *Campb.* 262, n.

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to the proprietors at large, but there is no statute to restrain them, as is the case with respect to the church. They might have prevented the public from crossing the bridge; but if they build a bridge and allow persons to use it, why should not the usual consequences follow?] One of the consequences of a dedication of a bridge to the public is, that the liability to repair it is thrown upon the county (*a*); but here the company could not exempt themselves from their liability to repair this bridge. [*Erskine* J. Supposing a man grants a right of way across his land, and covenants to keep it in repair, the mere circumstance of his so covenanting will not prevent him dedicating it to the public if he thinks proper. *Tindal* C. J. There is here a statutory contract, by which the company are bound to repair this bridge (*b*).] If the ordinary consequences cannot follow a dedication, that circumstance goes far to destroy any inference that the parties intended, or had any power to dedicate. The evidence of user in this case is not strong, only extending from 1822 to 1832, for that proved previous to that time was extremely

(*a*) As the bridge in question was not erected till 1804, it could not, by a dedication of it to the public, be made a county bridge, so as to throw the onus of repairing it on the county, inasmuch as it was not built under the direction, &c. of the county surveyor, as required by the 43 *G. 3. c. 59. s. 5.*

(*b*) Independently of the express provisions of the act, throwing the repair of the whole of the bridges over the canal upon the company, they would have been bound to maintain all bridges built across highways, the canal being made for private purposes, and not for the public benefit. See *Rex* v. *Inhabitants of Kent*, 13 *East* 220.; *Rex* v. *Inhabitants of Lindsey*, 14 *East*, 317.; *Rex* v. *Kerrison*, 3 *M. & S.* 526. As the bridge was not originally a public carriageway, and as it could not, for the reason already stated, become a county bridge, the dedication of it to the public seems to have thrown on the company the liability to repair it for the public *as a carriageway*, in addition to the statutory liability imposed upon them by the act. By such dedication the company appear to have brought themselves within the principle of *Rex* v. *Kerrison* and the other cases cited above.

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slight; and the whole is quite consistent with the company having given the public a temporary licence to pass along the bridge. At any rate, any presumption arising from such user, is rebutted by the acquiescence of the public in subsequently paying toll, for the period of five years.

Tindal C. J. This is an action of trespass for breaking and entering a certain close of the plaintiffs, being a bridge erected and placed over the *Grand Surrey Canal*. The answer set up by the plea is, that there is a public highway for carriages over the bridge in question and the defendant justifies the trespass complained of under such alleged right of way. The question, therefore, is, whether there is a public highway for carriages over the *locus in quo*.

Two objections have been made to the verdict found for the defendant, — the one, that Lord *Denman* improperly directed the jury that they might presume a dedication of the way to the public without reference to the intention of the party dedicating — the other, that there was no ground, taking into consideration the act of parliament, and the circumstances under which the bridge was built, for presuming a dedication.

It appears to me, looking at the whole of the direction, that no just complaint can be made of the way in which the case was submitted to the jury. The Lord Chief Justice told them, "Supposing the bridge in question to have been originally built, as a carriage way, for the exclusive accommodation of the tenant of the *Rolls* estate, still, if in consequence of the act of the company, an idea grew up in the minds of the public that they intended to dedicate the bridge to the public use, such acts would amount to a dedication." It seems to me that the groundwork of this direction is, that the jury are to consider whether what the public

supposed to be a dedication was a dedication in point of fact. It is hardly possible, when his lordship had the case of *Barraclough* v. *Johnson* before him, in which he himself says, that "a dedication must be made with an intention to dedicate," that he should have withdrawn the question of intention from the jury; the more especially after the discussion which took place between the counsel of the parties as to the intention of the company with respect to the alleged dedication. After that discussion, he may not have thought it necessary to go so fully into the question as he would otherwise have done; but taking the direction altogether, it is impossible not to see that he must have left it to the jury to say whether the plaintiffs intended to dedicate the way to the public.

The second question is, whether, by reason of the act of parliament, or from the nature of the plaintiffs' interest in the property, there was a want of power on their part to dedicate the bridge to the public. I am not aware that there is any thing in the constitution of the company, to prevent them from dedicating a way to the public, as other persons or corporate bodies may do. They are the masters of their own property; and though they may be answerable to the rest of the proprietors for a failure of duty, I see no reason why the public may not by user gain a right of way against them, as well as against any other individuals.

With respect to the evidence, it appears that from the year 1822 to 1832, the swivel-bridge over the canal at the spot in question was used by the public at large as a carriageway without interruption. This is attempted to be accounted for by the circumstance of there being so many persons tenants of the *Rolls* estate, who were entitled to use it. After the church was built in 1822, and the erection of numerous houses on both sides of the canal, it might become a

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matter of indifference to the company, whether they stopped every individual to enquire whether he had a right to use the way, or permitted all persons, who chose, to pass along the bridge. However that might be the fact is, that the public had the uninterrupted use of the way from 1822 to 1832. Is not that strong ground for inferring an intention on the part of the company to dedicate the way to the public? It is true that in 1834 they removed the swivel-bridge, and erected a permanent stone bridge in its stead, and that ever since a toll has been demanded and paid. If the matter were to rest on what had taken place since 1834, it could not be said that there had been a dedication to the public. But we must look back at what had occurred previous to that period; and if the public had acquired a right of way along the swivel-bridge, subject only to the temporary interruption caused by the passing of barges up and down the canal, the circumstance of the company erecting a stone bridge in its place cannot have the effect of destroying the right so acquired. It seems to me that there was evidence of a dedication to go to the jury, and I see no reason for saying that they have come to an improper conclusion; consequently this rule must be discharged.

Bosanquet J. not having been present at the commencement of the argument, declined giving any opinion.

Erskine J. If the only sentence uttered by the Lord Chief Justice had been that which has been commented upon in the course of the argument, a doubt might be entertained whether the jury fully comprehended that it was left to them to say whether it was the intention of the company to dedicate the bridge to the public or not. But when we find that the whole of the evidence was read over to the jury, and that the contest

before us on the part of the plaintiffs has chiefly been, that Lord *Denman* should have laid it down as matter of law that there was no dedication, it cannot be doubted that he must have stated the case in such a way as to give the jury to understand that it was for them to draw the conclusion from the evidence, whether or not the company had intended to dedicate the bridge to the public. If that were so, I am of opinion that the case was rightly left to the jury, and that he was not bound to direct them as matter of law, that the company could not make a dedication, but that the question was a matter of fact on which the jury were warranted in coming to the conclusion that there was such a dedication. The circumstance of the bridge having been originally a swivel-bridge, which was frequently swung back to allow vessels to pass, though a strong fact, would not be conclusive against there being an intention to dedicate it. A right of this kind may exist, though subject to be interrupted, as where a highway is crossed by a railroad. I therefore think, in this case, that a temporary interruption would not prevent the dedication of the bridge to the public, and that the defendant might maintain the issue in its present form.

Maule J. Supposing there was evidence to support it, the question whether there was a dedication of this bridge, was a question of fact for the jury; and it seems to have been properly submitted to them. I think there was sufficient evidence to establish a dedication. It appeared that for ten years the public crossed the canal, without interruption, by such means as were then at hand. If the public thereby gained a right of passage, an improvement in the bridge by the owners, so as to make it more convenient, would not take away the right. Many observations as to the nature of the company, and the purpose for which the bridge was

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erected, would no doubt be strongly pressed at the trial, and would deserve the attention of the jury in considering the question of dedication, which involved that of the intention to dedicate. I do not think the language of the Lord Chief Justice is inconsistent with his assuming that the jury were to take the intention to dedicate into consideration. In this case, many arguments may be brought forward on both sides of the question. It seems to me that the circumstance of the bridge being originally erected, as a carriageway, for the accommodation of a considerable number of individuals, inasmuch as the company must either have permitted the bridge to be used indiscriminately, or have put themselves to great expense in employing some person to see that those passing had a right to do so, furnishes a strong reason why they should have intended to dedicate the bridge to the public. At all events, as there undoubtedly was a case to go to the jury, and the facts were left to them, and there was no misdirection in point of law, the rule must be discharged.

Rule discharged.

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June 10.

A memorandum of charter provided that a vessel should ship goods for *Kingston*, or any other port in *Jamaica*, and having discharged the same, should receive on board a cargo from thence or from a port on the *Spanish* main if required, and deliver the same at a port in the United Kingdom on being paid freight 250*l.* in ten days after sailing from *Gravesend*, and 750*l.* more in two months after a right delivery of the homeward cargo, provided she should be required to proceed to one port only in *Jamaica*, and 25*l.* more should she be required to go to two or more ports in that island; and in case the vessel should be ordered to the *Spanish* main, 4*l.* per day was to be paid for every day after the twenty-fifth, after her arrival at *Jamaica*, until dispatched from her loading port; demurrage 100*l.* per month, or in proportion for a less period, payable on settlement of the hire of the vessel.

In assumpsit on the memorandum of charter, the declaration averred that the vessel after discharging a portion of her outward cargo at *Kingston*, and the rest at another port in *Jamaica*, sailed thence to a port on the *Spanish* main, to receive a homeward cargo, and was detained there 139 days after the twenty-fifth day of her arrival at *Jamaica*, and alleged for breach the non-payment of the 4*l.* per day, for the 139 days.

The plea stated, that the vessel never delivered her homeward cargo at any port of discharge in the United Kingdom.

Held, on demurrer to the plea: that the 4*l.* per day was not payable until two months after the delivery of the homeward cargo.

ASSUMPSIT on a charter-party. The first count of the declaration stated that theretofore, to wit, on the 28th of *April* 1837, by a certain agreement or memorandum of charter-party then made between the plaintiff (therein described, to be the owner of the good brig or vessel called the "*Britannia*," of the burthen of one hundred and ninety tons, or thereabouts, then in the port of *London*,) and the defendant, (therein described as *Noel T. Smith*, and Co., of *Lime Street Square*, merchants,) it was mutually agreed between them, that the said ship, being tight, stanch, and strong, newly coppered, and every way fitted for the voyage, should be placed immediately at the disposal of the charterer, to receive such goods as he might direct to be shipped for *Kingston*, and/or any other port in *Jamaica*; and having discharged the same, should receive on board a cargo from thence, or from a port on the *Spanish* main, if required, (the port charges there being borne by the

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charterer,) not exceeding what she could reasonably stow and carry; and, being so loaded, should therewith proceed to a port in the United Kingdom, or so near thereunto, as she might safely get, and deliver the same on being paid freight 250*l.* in ten days after sailing from *Gravesend*, and 750*l.* more in two months after a right delivery of the homeward cargo, at her port of discharge in the United Kingdom, provided she should be required to proceed to one port only in *Jamaica*, and 25*l.* more should be required to go to two or more ports in that island; and that in case the vessel should be ordered to the *Spanish* main, 4*l.* sterling per day was to be paid for every day after the twenty-fifth day after her arrival at *Jamaica*, until dispatched from her loading port; Captain *R. Ross* to have the command for the intended voyage; and the ship was to be dispatched within ten days from the day she should be ready to receive cargo outwards in the *West India Dock*; should she not be ready to receive the same on or before the 5th of *May* next, the charterer to have the option of cancelling the agreement; the vessel to be dispatched from *Jamaica* on or before the 1st of *August*, then next ensuing, provided she arrived there in fifty-five days from *Gravesend*; otherwise, forty lay days were to be allowed to discharge the outward cargo and load homewards; demurrage 100*l.* per month, or in proportion for a less period, payable on settlement of the hire of the vessel; the outward cargo to be taken from, and the homeward put alongside, the ship free of drogherage the vessel's own boats giving all ordinary assistance the customary brokerage of 2½ per cent. to be allowed by the ship-owner to the charterer on that agreement.

Mutual promises. Averment, — that the said ship being then tight, stanch, and strong, newly coppered, and every way fitted for the voyage in the said agreement mentioned, and then having on board thereof al

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such goods as the defendant directed to be shipped for *Kingston* aforesaid, or any other port in *Jamaica* aforesaid, after the making of the said agreement which then remained and was wholly uncancelled, to wit, on the 18th *May* in the year aforesaid, sailed from the port of *London* aforesaid, under the command of the said *Robert Ross*, and afterwards, to wit, on the 29th *June* in the year aforesaid, arrived in *Jamaica* aforesaid, to wit, at *Kingston* aforesaid, there in less than fifty-five days, to wit, in forty-two days from *Gravesend* aforesaid, and there, to wit, at *Kingston*, discharged a great part of her said outward cargo according to the said agreement; and afterwards, to wit, on the 18th *July* in the year aforesaid, by the directions of the agents of the defendant, proceeded to a certain other port in the said island of *Jamaica*, to wit, *Annatto Bay*, and then and there discharged the residue of her said outward cargo: that after having so discharged the residue of her said outward cargo, to wit, on the 31st *July* in the year aforesaid, the said ship was ordered by the agents of the defendant to sail, and in pursuance of such orders sailed from *Annatto Bay* aforesaid, for a certain port on the *Spanish* main aforesaid, to wit, for *Savanilla*, for the purpose of there loading on board a cargo to be thence conveyed to a port in the said United Kingdom according to the said agreement; and the said ship afterwards, to wit, on the 1st *December* in the year last-mentioned, arrived at *Savanilla* aforesaid, and was then and always, whilst she remained at *Savanilla* aforesaid, ready to receive and load on board a homeward cargo, whereof the defendant then had notice; nevertheless, the defendant did not dispatch the said ship from the said loading port, to wit, *Savanilla* aforesaid, on her homeward voyage in the said agreement mentioned, or for any port in the said United Kingdom, until a certain day, to wit, the 10th

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December in the year aforesaid, being divers, to wit, 139 days after the twenty-fifth day from the said ship's arrival at *Jamaica* as aforesaid; whereby, the said ship having been so as aforesaid ordered to the Spanish main, the defendant, according to the said agreement, became and was liable to pay to the plaintiff the sum of 4*l.* for each such day, after the said twenty-fifth day from the said ship's arrival at *Jamaica* as aforesaid, until dispatched from her loading port as aforesaid; whereof the defendant, before the commencement of the suit, to wit, on the 22d *April* 1838, had notice and was then requested to pay the same to the plaintiff: yet the defendant had disregarded his promise, and had not paid to the plaintiff the said sum of 4*l.* for each or any such day after the said twenty-fifth day from the said ship's arrival at *Jamaica* as aforesaid, until dispatched from her loading port as aforesaid; but the defendant had wholly neglected and refused so to do, contrary to the said agreement and the said promise of the defendant in that behalf.

The seventh plea — as to the supposed breach of promise in the said first count above assigned — alleged that the said ship, after the same arrived at *Savanilla* as aforesaid, never proceeded to any such port as she might safely get to, nor was a certain homeward cargo (wherewith the said ship was, according to the said agreement in that behalf, to wit, on the 10th *December* in the year aforesaid, dispatched from *Savanilla* aforesaid, and which last-mentioned cargo was to be delivered according to the said agreement in that behalf,) ever delivered at any port of discharge in the said United Kingdom. — Verification.

General demurrer, and joinder.

Bompas Serjt. in support of the demurrer. The question raised on these pleadings is, whether the plain-

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an recover the payment of 4*l.* per day in conse-
ce of the vessel being ordered to the *Spanish* main,
igh she has not reached her ultimate destination.
l be said on the other side that this payment was
ie until the ship arrived at her last port of discharge.
submitted that the voyage to the *Spanish* main
n intermediate and independent voyage, and that
yment to be made in respect of it was not freight,
: legal sense attached to that word. This pay-
is distinctly provided for, and is not connected
he carrying of any cargo. Supposing a vessel be
for a voyage from *London* to *Jamaica* and back,
certain freight is to be paid for the outward and
ain freight for the homeward voyage, the loss of
ip on her return would not prevent the recovery
: outward freight. So, if a vessel be chartered
England to *Calcutta* and back, with a stipulation
intermediate voyage to *Singapore*, the freight for
intermediate voyage may be recovered, notwith-
ing the vessel be lost on the homeward voyage.
re a payment is to be made for intervals of time,
due at each interval, unless the contrary be ex-
ed: for instance, if a ship be hired at a certain
per month, such sum is payable at the end of each
h, unless a contrary intention appear on the char-
arty, as in *Smith* v. *Wilson* (*a*) and *Gibbon* v.
lex. (*b*) In *Havelock* v. *Geddes* (*c*) it was held that
eight being earned monthly, it was due at the end
ch month, although the actual payment of it was
oned. This is a stronger case; for the charter-
contains no stipulation fixing or postponing the
of actual payment of the 4*l.* per day. The general
of law is, that money is due and payable as soon
s earned; and there is nothing to take the present

(*a*) 8 *East*, 437.
(*b*) 2 *B. & Ald.* 17.
(*c*) 10 *East*, 555.

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case out of such general rule; for there is no co
that the vessel shall arrive at her last port of di
before the 4*l.* per day in respect of the voyage
Spanish main shall become payable. The mea
the phrase "per day" is, that the sum shall be
day by day. [*Maule* J. The sum may be payable
day, but not *upon* the day.] In *Mackrell* v. *Sim*
the plaintiff let his ship to freight under a charte
"by the month, for such time as she should be en
in performing a voyage from *London* to *Plymou*
the island of *Grenada*, and from thence back to *L*
and, among other things, covenanted that the
should, "in such *outward and homeward* voyag
and unload all lawful goods, and that he would
port charges and pilotage." The defendant
other things) covenanted "that the ship should
charged out of her said monthly employ on the
of her homeward cargo in *London*;" and also
"to the said owner, his executors, &c., in full,
freight and hire of the said ship, at the rate of 1
calendar month, for all such time as the said shi
be taken up in performing the voyage aforesaid,
mence," &c. The voyage to *Grenada* occupie
months. The ship being lost on her return, th
decided that freight was payable for three mon
period of the outward voyage. Lord *Mansfie*
"by express agreement, the parties may make
ward and homeward voyage, one. Nothing
common than two voyages; wherever there
voyages, and one is performed, and the ship is
the homeward voyage, freight is due for t
Here the outward and homeward voyage are
in the charter-party. The cargo is loaded
and the owner covenants to pay port charges

(*a*) *Abbott on Shipping*, 333. 5th ed. 418. 6th

outward voyage. The whole of that voyage was completed: port duties are incurred and paid."

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Channell Serjt., *contrà*, was stopped by the Court.

TINDAL C. J. It appears to me that we are not called upon to dispute the general proposition of law which has been adverted to by the plaintiff's counsel. We must construe this contract according to the language used by the parties to express their intention. It seems to me that the charter-party contemplates only two voyages — an outward and an homeward voyage. The outward voyage was to *Kingston*, or any other port in *Jamaica*; the homeward, either from a port or ports in *Jamaica*, or from a port on the *Spanish* main, to a port of the United Kingdom. It has been contended that the voyage to the *Spanish* main was an intermediate voyage; but it appears to me that it was only part of the homeward voyage. This construction seems to follow naturally from the words of the charter-party, which provides that the ship, having discharged her outward cargo in *Jamaica*, "should receive on board a cargo from thence, or from a port in the *Spanish* main, if required." We have no more right to treat the sailing from *Jamaica* to the *Spanish* main as a distinct and intermediate voyage, than the going from one port to another in *Jamaica* in order to complete the cargo. I understand the meaning of the charter-party to be, that whatever sum became payable for proceeding to the *Spanish* main, should be added to the gross sum payable in respect of the whole voyage. The payment of the freight is thus provided for — "250*l.* in ten days after sailing from *Gravesend*, and 750*l.* more in two months after a right delivery of the homeward cargo at her port of discharge in the United Kingdom, provided she be required to proceed to one port only in *Jamaica*."

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The charter-party then contemplates the possibility larger sum becoming due, — "and 25*l.* more should be required to go to two or more ports in that islan It then provides for the other contingency of the ve being sent to the *Spanish* main — "and in case the ves shall be ordered to the *Spanish* main, 4*l.* sterling is be paid for every day after the twenty-fifth day after h arrival at *Jamaica* until dispatched from her loadi port." As, in the one event, the 25*l.* were to be add to the 750*l.* after the vessel arrived at her port of di charge in the United Kingdom, so I think that the ju construction of the charter-party is, that, in the oth event, the 4*l.* per day were likewise to be added. can see nothing in the situation of the parties to make probable that their intention was, that the homewa freight should be contingent on the safe arrival of t ship, and that the payment of the 4*l.* per day for t trip to the *Spanish* main was to be a separate and in mediate payment. I therefore think, as the ship h never returned, that such payment has not become du and that our judgment must be for the defendant.

COLTMAN J. *Havelock* v. *Geddes* was a very differe case from the present. There, the hiring was for twel months, and for such longer period as the defenda should choose to retain the ship, with a stipulation th the freight should be paid at certain specified interva Being a time charter, each of the stipulated periods payment was naturally considered as if it were a separa voyage. There, also, the charter-party contemplat no particular voyage, but the vessel was to be und the control of the defendants, and to be dispatch whithersoever they thought proper. Here, the charte party is for a voyage out and home, with liberty to load t homeward cargo at two or more ports in *Jamaica*, or a port on the *Spanish* main. It seems to me that w

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ne exception of the 250*l.* to be paid in ten days after sailing from *Gravesend*, the intention of the parties was, that the whole of the freight should be payable only on the arrival of the vessel at her last port of discharge, in conformity with the general rule of law with respect to the payment of freights.

ERSKINE J. I do not think that the clause in question does more than provide for additional freight in certain given events. If the vessel were required to proceed to one port only in *Jamaica*, 750*l.* were to be paid in addition to the 250*l.*; if to two or more ports, 25*l.* more; and if ordered to the *Spanish Main*, 4*l.* per day for the extra time which would be thereby occupied. Though the word "more" does not occur in the clause relative to the ship's being ordered to the *Spanish Main*, it is to be understood, for the Court cannot avoid giving the same interpretation to that clause as to the others, unless they see some reason why it should differ from the rest. No such reason has been pointed out in the course of the argument, and I can discover no ground for thinking the parties meant that the 4*l.* per day should be paid immediately, rather than the 25*l.* or the demurrage. It seems to me that the fair construction of the charterparty is, that the whole freight was to be paid on the safe arrival of the ship at her ultimate port of discharge.

MAULE J. Contracts like this are to be construed according to the intention of the parties, as it is to be gathered from the language they have employed. The cases which have been cited, so far as they bear upon the present, are in favour of the defendant, as they all go to support the proposition, that freight is not payable until the arrival of the ship at her port of discharge, unless the contrary be expressed. Freight is generally

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payable only on the arrival of the vessel, when the merchant receives the goods on which it is charged: and the presumption is, should there be any doubt as to the time of payment, that it is not to be paid until that event. The period at which the freight is to be paid under this charterparty appears to me to be free from doubt. 250*l.* are to be paid in ten days after sailing from *Gravesend;* 750*l.* more in two months after a right delivery of the homeward cargo at the port of discharge in the United Kingdom, if the vessel is required to proceed to one port only in *Jamaica;* 775*l.* if to two or more ports there; and the 750*l.*, or 775*l.*, *plus* 4*l.* per day, for as many extra days as may be occupied by the ship being ordered to the *Spanish Main:* the time for payment of the whole to be on the arrival of the vessel at her port of discharge. The stipulation as to the 250*l.* shews, that when the parties intended that a sum of money should be paid at a particular time, they took care to have it so stated. It seems to me, that the payment of the 4*l.* per day was to be made at the same time with the rest of the freight, 750*l.* or 775*l.*, as the case might be. To say that this sum of 4*l.* was payable day by day, is to seek to introduce into the charterparty something which is not expressed; and I believe it would have surprised both parties if they had been told at the time they entered into the contract, that they contemplated doing any such thing.

Judgment for the defendant.

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LUCAS *v.* BEACH, Bart.

June 15.

ASSUMPSIT for 200*l.* for work done and materials provided, and journeys made by the plaintiff, his clerks, agents, and servants, for money paid for the defendant's use, and upon an account stated. Pleas, first, non-assumpsit; secondly, payment and acceptance of 100*l.* in full satisfaction, and issue thereon. The plaintiff by his particulars of demand claimed the sum of 165*l.* 17*s.*, but gave credit for 50*l.* received on account.

At the trial of the cause before *Rolfe* B. at the last *Wiltshire* assizes, it appeared that on the 19th of *October* 1838, a public meeting, at which the defendant presided, was held to consider the propriety of making a turnpike road from *Amesbury* to *East Kennet*, in the county of *Wilts*. Resolutions were passed to have the line surveyed; a committee was formed and an advertisement inserted in a provincial paper, inviting tenders for the survey.

On the 24th the committee met, the defendant being in the chair, when the defendant gave in a proposal by which he undertook "to furnish a plan, admeasurement, value of the land, and an estimate of the probable expense of the proposed new line of road," for 100*l.* This offer being accepted, the solicitor to the committee made the following minute of the transaction.

The plaintiff entered into an express contract with a committee of individuals, associated together for the purpose of obtaining an act of parliament for making a turnpike road, to do certain work for a specified sum: he afterwards caused his name to be inserted in the list of subscribers for two shares. Held, that he was not thereby precluded from recovering upon such express contract.

A minute of a resolution come to by a committee, that a tender for work was accepted, is not a minute or memorandum of an agreement requiring a stamp within the 55 *G.* 3. *c.* 184.

But a minute of a resolution which purported, on the face of it, to be an agreement that the plaintiff should have an additional sum for the extra trouble imposed on him by a deviation from the original line of road, and which was read over to the plaintiff, and was assented to by him, requires an agreement stamp. *Per Rolfe* B. at *Nisi Prius*.

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"Mr. *G. O. Lucas* attended the meeting, and produced an estimate for making the survey, maps, and admeasurement, and a valuation of the expenses, including the purchase of the land, as required by parliament, for the sum of 100*l.* on the understanding that he is to be paid only for the work done, if the maps are not required for parliament; which offer the committee accepted."

At the same meeting, the solicitor read over to the plaintiff the standing orders of the House of Commons, with respect to the introduction of road bills, and gave him the map published with the orders.

On the 14th of *November* the committee met again, the defendant in the chair, when it was determined to make a deviation from the line as originally proposed, and the following minute was made.

"It was agreed that there should be a deviation in the line of road laid down in Mr. *Robbins'* plan, commencing at a stile between *Upavon* and *Chisenbury*, in the parish of *Netheravon*, and following the direction of a foot path towards *Upavon*, and thence through *Upavon* to *Hilcott*, thereby avoiding the Devizes and Andover trust; and that Mr. *Lucas* be allowed an additional sum of 20*l.* for the extra trouble he will have." After the foregoing minute was made, it was read over to the plaintiff, who assented to it.

The requisite notices of the intention to apply to parliament were given in the *London Gazette*, and in the provincial papers; and on the 28th of *November* another meeting of the committee was held, when it was resolved that application should be made to parliament in the ensuing session, for an act to form the proposed turnpike road, and the solicitors were ordered to take the necessary proceedings for obtaining such act.

By the standing orders of the House of Commons, the plans and sections of the proposed road were to be

leposited with the clerk of the peace on or before the 30th of *November*, but the plans only were deposited on that day, the plaintiff not completing the sections before the 17th of *December*. Leave was given by the House to bring in the bill, but its further progress for that session was stopped by reason of the failure to deposit the sections at the prescribed period, and also in consequence of certain individuals not having been served with a notice in sufficient time.

A meeting of the committee was convened on the 28th of *March* 1839, when a report having been made of what had occurred, it was resolved that proceedings should be taken to go again before parliament in the next session; and the plaintiff having applied for money on account, the committee, stating that they were not bound to pay him any thing until satisfied that the maps and sections were correct, agreed to pay him 50*l.* without prejudice. At a subsequent meeting, the plaintiff was told by the committee that they would not employ him any longer, and they refused to pay him any further sum, on the ground that his plans and sections were so erroneous as to be useless.

At the meeting of the 14th of *November* a subscription list was produced, headed, "Proposed new road from *Amesbury* to *Kennet*. List of shareholders. Shares, 25*l.* each;" and the solicitor, at the request of the plaintiff, set down the name of the latter for two shares. The plaintiff never paid any money on account of such shares, and no application was ever made to him to do so.

The minutes of the 24th of *October* and the 14th of *November* were both objected to, on the part of the defendant, as being inadmissible in evidence without being stamped. The learned baron received the former, but rejected the latter, on the ground, that as it purported,

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on the face of it, to be an agreement, and had been read over to the plaintiff and assented to by him, it was evidence of a contract, and required a stamp.

At the close of the plaintiff's case the defendant's counsel contended that he ought to be nonsuited, inasmuch as he was a partner in the undertaking. The learned baron having, however, refused to nonsuit the plaintiff, the defendant proceeded to call witnesses to shew that the plaintiff's plans and sections were incorrect and useless, and that the latter had not been finished within the time prescribed by the standing orders of the House of Commons.

The learned judge gave it as his opinion that the plaintiff had not entered into any contract to complete the plans and sections within any definite period; and, withdrawing the question of partnership from the jury, left it to them to say, whether the work was properly done; and if they thought that the plaintiff ought to recover, what he was entitled to, beyond the 50*l.* that had been paid, in respect of the plans and sections, and of a journey to *London* made by himself and clerk.

The jury having found their verdict for the plaintiff, damages 80*l.*, the learned baron gave the defendant leave to move to enter a nonsuit, if the court should think the partnership applied to the whole demand of the plaintiff, or otherwise to reduce the verdict to 50*l.* in case it should be held that the partnership applied only to part.

Channell Serjt., in last *Easter* term, moved accordingly, and contended that the action could not be maintained, the plaintiff clearly being a partner in the undertaking. He also submitted that the minute of the 24th of *October* should have been stamped; but, when the rule came on for argument, he admitted that he

could not sustain this objection after the decision of the Court in *Vaughton* v. *Brine.* (*a*)

Talfourd Serjt. now shewed cause. The first question is, whether the plaintiff, by the insertion of his name in the list of subscribers, became a partner in the proposed undertaking, so as to prevent him from maintaining an action for the whole or any portion of his demand. It is submitted that by such insertion no immediate contract of partnership was created; for, strictly speaking, there could not be any shareholders in the scheme until it was sanctioned by an act of parliament. The cases of *Holmes* v. *Higgins* (*b*), *Milburn* v. *Codd* (*c*), and *Goddard* v. *Hodges* (*d*), cited when this rule was moved for, may be distinguished. *Holmes* v. *Higgins*, which was chiefly relied on, is essentially different from the present case. There, the plaintiff had been one of the parties originally engaged in the undertaking, and one of its chief promoters: here, the plaintiff merely allowed his name to be put down for two shares, a considerable time after the scheme was set on foot. It is submitted that this case does not fall within the principle of *Holmes* v. *Higgins*, but within that laid down in *Fox* v. *Clifton* (*e*), founded upon the prior decisions of *Vice* v. *Lady Anson* (*g*) and *Dickinson* v. *Valpy.* (*h*) In *Vice* v. *Lady Anson*, a shareholder in a mining company, who had paid money for shares and had received a certificate that she was the proprietor of those shares, and who had spoken and written of herself, in private letters and

(*a*) *Antè*, p. 359.

(*b*) 1 *B.* & *C.* 74.; 2 *D.* & *R.* 196.

(*c*) 7 *B.* & *C.* 419.; 1 *M.* & *R.* 238.

(*d*) 3 *Tyrwh.* 209.; 1 *C.* & *M.* 33.

(*e*) 6 *Bingh.* 776.; 4 *M.* & *P.* 676.; 9 *Bingh.* 115.; 2 *M.* & *Sc.* 146.

(*g*) 7 *B.* & *C.* 409.; 1 *M.* & *R.* 113.; 3 *C.* & *P.* 128.; *M.* & *M.* 98.

(*h*) 10 *B.* & *C.* 128.; 5 *M.* & *R.* 126.

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society, as being a shareholder, but who had not h[illegible] herself out to the world as a partner, and to whom [illegible] interest in the mine had really passed, was held not lia[illegible] for goods supplied for the use of the mine. In *Dick[illegible]son* v. *Valpy*, where it was proved that the defendant h[illegible] applied to the secretary of a mining company for shar[illegible] and that some were appropriated to him, on which [illegible] paid an instalment of 15*l.* per share, and that he attend[illegible] at the counting-house of the company and there sign[illegible] some deed, and afterwards attended a general meeti[illegible] of the shareholders; the Court of King's Bench incline[illegible] to think (but it was not necessary to decide the poin[illegible] that there was not sufficient evidence to shew that th[illegible] defendant had ever become a complete partner in th[illegible] company, or that he had held himself out to the wor[illegible] as such partner. In *Fox* v. *Clifton* it was held, that th[illegible] mere circumstance of applying for shares in a joint-sto[illegible] company, and payment of the deposit thereon, did n[illegible] constitute the defendants partners, they not havin[illegible] otherwise interfered in the concern; and that the fact [illegible] their names being inserted, without their knowledge, i[illegible] a book containing a list of the subscribers, was not holding of themselves out to the world as partners, s[illegible] as to render them liable for the debts of the compan[illegible] So in *Pickford* v. *Davis* it was decided, that a subscribe[illegible] to a company, who had taken shares and paid a depos[illegible] on them, was not liable upon a contract of the directors, (who had commenced business when only 1400 out o[illegible] the 10,000 shares, of which the company was originally intended to consist, had been taken) without proof tha[illegible] he knew and assented to their proceeding with th[illegible] smaller capital, or had expressly authorised the enterin[illegible] into the contract. If, as appears from *Pickford* v. *Davis* the question in each particular case is, whether th[illegible] party authorised the making of the contract, it is clea[illegible] that the present plaintiff did not do so; for he entere[illegible]

ıto the agreement with the defendant as the opposite ontracting party. In *Howell* v. *Brodie* (*a*) the defendnt, from 1829 to 1833, advanced various sums with a iew to a partnership in a market about to be erected, knew that the money was applied towards the erection, and was consulted in every stage. In *October* 1833, by a written agreement, it was settled that the market should be valued, and that he should have a seventh share. It was held, that he was not liable as a partner until *October* 1833, notwithstanding profits had been made, but not accounted for to him, before that time. Here, the parties contemplated a change in their relations, and were looking forward to obtaining an act of parliament, in which event they would take shares in the undertaking, and until that time there was only an inchoate partnership among them. At all events, *Howell* v. *Brodie* shews that the present plaintiff cannot be held to have been a partner before the 14th of *November*, and consequently he is entitled to recover upon the express contract made with him previous to that time. In *Wilsford* v. *Wood* (*b*), which was an action for goods sold and delivered, the plaintiffs were nonsuited because one of them was not a member of the firm at the time when the contract was entered into, although he was to have a share in the profits from a period prior to the making of such contract. And in *Young* v. *Hunter* (*c*), which is the converse of the preceding case, it was held, that where one purchases goods, and another is afterwards permitted to share in the adventure, the vendors cannot recover against such other person for the price of the goods. These cases shew that the plaintiff is clearly entitled to retain his verdict for a portion of his demand, and therefore, at any rate, the rule must be discharged with respect to entering a nonsuit.

(*a*) 6 *New Cases*, 44.; 8 *Scott*, 372.

(*b*) 1 *Esp. N. P. C.* 182.

(*c*) 4 *Taunt.* 582.

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Channell Serjt., in support of the rule. The cases that have been cited establish a position which the defendant is not interested in disputing. They are all cases of actions brought by third parties, in which there was no pretence for saying that the work was done on the personal credit of the parties sought to be charged, who could only be rendered liable by reason of their interests in the different speculations. It is said, that no partnership could be formed here until the act of parliament was obtained: but what is there to prevent a number of individuals from entering into a partnership with the limited object, in the first instance, of procuring an act of parliament, and with an ulterior object in view when the act has passed? *Holmes* v. *Higgins* (a) shews that there may be such a partnership. It was there decided, that persons associating together and subscribing money, for the purpose of obtaining an act of parliament, are partners in the undertaking; and it was held, that a subscriber, who acted as their surveyor, could not maintain an action for work done by him in that character on account of the partnership against the chairman of the committee, or any of the other subscribers. *Milburn* v. *Codd* (b) and *Goddard* v. *Hodges* (c) are to the like effect. [*Maule* J. The plaintiff did not become a shareholder till the 14th *November*: why should he not recover on the express contract previously made with him?] If the Court think that there was an express contract made with the plaintiff before he became a partner, which he has performed, he may perhaps be entitled to recover in respect of such contract. But it is submitted, that he is suing on a *quantum meruit*, and not on the express contract which he never completed, and which was repudiated by the committee.

(a) 1 *B. & C.* 74.; 2 *D. & R.* 196.

(b) 7 *B. & C.* 419.; 1 *M. & R.* 238.

(c) 3 *Tyrwh.* 209.; 1 *C. & M.* 33.

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TINDAL C. J. It seems to me that there is no ground for entering a nonsuit in this case. It appears that, on the 24th of *October*, the defendant made an express contract with the plaintiff for the performance of certain work at a specified price; and that, on the 14th of *November*, the plaintiff, by taking two shares, became a partner in the undertaking. The circumstance of the defendant then becoming a partner does not affect the express contract previously made with him, and he is therefore entitled to recover in respect of that contract. As regards, however, the further sum for which the jury found their verdict, as that was for work done subsequently to the 14th of *November*, and at a time when the defendant was a partner, the case falls within the principle of *Holmes* v. *Higgins* and *Goddard* v. *Hodges*; and, consequently, the rule must be made absolute to reduce the verdict to 50*l*.

COLTMAN J. There is no difficulty in this case as soon as the facts are ascertained. It is quite clear, that the plaintiff is entitled to recover on the express contract made with him previously to his becoming interested in the undertaking.

ERSKINE J. I also am of opinion, that the plaintiff is precluded, by becoming a partner on the 14th of *November*, from recovering in respect of any implied contract subsequent to that time. But as he was not a partner when the original contract was made with him, he may, notwithstanding he became a partner afterwards, recover upon that contract.

MAULE J. I also think that the verdict should be reduced to 50*l*., and that the rule must be discharged so far as relates to the entering of a nonsuit. The plaintiff having become a partner on the 14th of *Novem-*

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ber cannot recover for the extra work afterwards performed by him. But with respect to the work done by him under the special contract, his becoming a partner subsequently in the undertaking cannot vary his right to sue on such contract. As regards, however, that portion of the damages which were given, not in respect of the express contract, but of the implied contract arising from the performance of services by the plaintiff after he so became a partner, it is as clear that he is not entitled to recover.

Rule absolute accordingly.

June 9.

TRUSLOVE *v.* WHITECHURCH and Others.

A writ of summons, indorsed "The plaintiff claims 95*l.* 9*s.* 6*d.* for debt, and *l.* for costs," leaving the amount of the costs in blank, is irregular.

A defendant served with the copy of a writ of summons, which writ, if truly copied, would be irregular, may move "to set aside the service of the writ." And in a case where it was not shewn whether the copy served was or was not a true copy, the court made such a rule absolute.

CHANNELL Serjt. obtained a rule *nisi* to set aside the service of a writ of summons upon one of the defendants, for irregularity, with costs, on the ground, that on the copy served, there was no indorsement of the amount of costs, as required by the rule of *H. T.* 2 *W.* 4., which orders, that "upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such process, or copy and service, and attendance to receive debt and costs." (*a*) Upon the copy served, the indorse-

(*a*) 8 *Bingh.* 305. By *R. M.* 3 *W.* 4. the former rule is declared to be applicable to writs issued under the Uniformity of Process Act, 2 *W.* 4. *c.* 39. 9 *Bingh.* 444.

ment was as follows: — "95*l.* 9*s.* 6*d.* for debt, and *l.* for costs."

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Bompas Serjt. now shewed cause. The supposed irregularity is, that a blank is left for the costs. No objection would have lain if the indorsement had expressly stated that the plaintiff claimed no costs. It could not have been contended, that such an indorsement would have entitled the defendant to set aside the service of the writ; for the defendant could not have been prejudiced, inasmuch as he would have been entitled to stay the proceedings upon payment or tender of the debt only, and he would have been entitled to do so here. [*Maule* J. The blank seems to be left to be filled up at the plaintiff's pleasure.]

The motion is wrong in form. The defendant should have applied to set aside the writ. In *Harker* v. *Jarmaine* (*a*) the service was irregular, yet the court of Exchequer discharged a rule for setting aside the *service* of the writ. The objection should have been taken, not to the service of the writ of summons, but to the writ itself, of which the copy served must, *primâ facie*, be regarded as a correct transcript. [*Maule* J. The copy may be wrong, and the writ be right.]

Channell Serjt. in support of the rule. This is a clear irregularity. The object of the rule of *H.* 2 *W.* 4. (*b*) was to place actions for debts on a different footing from actions brought to recover unliquidated damages; *Bowditch* v. *Slaney*. (*c*) Such an indorsement as the present would be a receipt to prevent a defendant from having the benefit of this rule of court. *Harker* v. *Jarmaine* is contrary to principle, and is at variance with *Chalkley* v.

(*a*) 1 *Cro.* & *M.* 408., reported also 3 *Tyrwh.* 381.

(*b*) *Suprà*, 426.

(*c*) 4 *Dowl. P. C.* 140. reported also as *Bowdidge* v. *Slaney*, 2 *Scott*, 197.

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Carter. (*a*) In *Hall* v. *Redington* (*b*), it was held an application to set aside the copy of a writ s was nugatory (*c*), and that where the copy serv irregular, the proper course is to move to set aside service of the writ" (*d*), or "the service and copy."

TINDAL C. J. It is competent to a plaintiff to don his right to costs, but he must not leave the n in doubt. Here, by the indorsement on the served, "The plaintiff claims 95*l.* 9*s.* 6*d.* for debt *l.* for costs," the matter is left in complete u tainty. The case of *Hall* v. *Redington* shews the of motion to be correct.

COLTMAN J. I do not collect from this indor that the plaintiff meant to abandon his costs. that the form of the motion is correct.

(*a*) 4 *Dowl. P. C.* 480. *S. P. Lloyd* v. *Maurice*, 9 *East*, 528.; *Huggett* v. *Parkin*, 1 *Bingh.* 65.; 7 *B. Moore*, 359.

(*b*) 5 *M. & W.* 605.

(*c*) The copy of the writ is the machinery by which the service of the writ is effected, ... of the attorney's ... a motion to set aside might perhaps be a shewing that the ... was a correct tra ... a defective origin present case this c happened, as son fendants had, i served with co the blank was fi

MAULE J. The plaintiff claims 95*l.* 9*s.* 6*d.* for debt, and an uncertain sum for costs. The motion is correct in form.

Rule absolute.

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DOE dem. BURRIN *v.* CHRISTOPHER CHARLES CHARLTON.

June 5.

EJECTMENT to recover a freehold house, buildings, and garden, situate at *Leatherhead* in the county of *Surrey*, which were devised by the will of *William Baker* deceased.

By consent (under 3 & 4 *W.* 4. *c.* 42. *s.* 25.), the following case was stated for the opinion of the Court.

William Baker, late of the parish of *Leatherhead*, in the county of *Surrey*, peruke maker, deceased, being seised, in fee simple in possession, of the tenements in question, on the 24th *January* 1789, made his will, which was duly signed by him and attested by three witnesses, and thereby devised the tenements in question in the following words: —

"I give, devise, and bequeath unto my loving wife *Ann*, all that my messuage or tenement, outhouses, buildings, garden, and premises, with their and every of their appurtenances whatsoever belonging, situate, lying, and being in the parish of *Leatherhead* aforesaid, and in my own occupation: to have and to hold the said messuage or tenement, outhouses, garden, and premises with their appurtenances, unto my said wife *Ann*, for and during the term of her natural life; and from and after her decease, I give, devise, and bequeath the aforesaid messuage or tenement, outhouses, garden, and premises, with their appurtenances, unto my brother *Richard Baker*: to have and to hold the

By a will made before the 7 *W.* 4. & 1 *Vict.* *c.* 26. *s.* 29., *A.* devises to *B.* for life, remainder to the eldest son of *B.*; but for want of such issue then to the daughter or daughters of *B.*, share and share alike, for ever; but in case *B.* have no issue, then to hold to him his heirs and assigns for ever: Held, that *B.* took an estate in tail general.

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said messuage or tenement, outhouses, garden, and premises with their appurtenances, for and during the term of his natural life; and from and after the decease of my said brother, I give, devise, and bequeath the aforesaid messuage or tenement, outhouses, garden, and premises with their appurtenances, unto my kinsman, *Samuel Charlton* of *Croydon*, in the county of *Surrey*, labourer: to have and to hold the said messuage or tenement, outhouses, garden, and premises with their appurtenances, unto my said kinsman, for and during the term of his natural life; and from and after his decease, I give and bequeath the said messuage or tenement, with the premises, unto the eldest son of my said kinsman, *Samuel Charlton;* but for want of such issue then to his daughter or daughters, share and share alike, for ever; but in case my said kinsman have no issue, then, to hold to him, his heirs and assigns, for ever."

The testator by his said will devised other property to his wife in fee simple, and gave her all the residue of his real and personal estate, and appointed her sole executrix of his will.

The testator died in the month of *June* 1799, having continued to be seised in fee simple in possession of the tenements in question, from the time of making his will until his death. Upon the said testator's death, his wife, *Ann Baker*, then his widow, entered into possession of the tenements in question, and continued in such possession until her death in *September* 1803. Upon her death, the said testator's brother, *Richard Baker*, entered into possession of the tenements in question, and continued in such possession till his death in *December* 1804.

Immediately after the death of *Richard Baker*, the testator's kinsman, *Samuel Charlton*, entered into the receipt of the rents and profits of the tenements in question, and continued in such receipt until his death in *November* 1831.

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date of the testator's will, and also at the
ıe testator, the said *Samuel Charlton* had the
:hildren, his lawful issue, living at the said
:ctively, namely, *Thomas Charlton*, his eldest
, his second son (under whom the defendant
:), and two daughters. The second son,
l the two daughters, survived their father.
l *Thomas Charlton* died in the month of *Oc-*
, in the lifetime of his father *Samuel Charlton*,
ee children, namely, *Sarah*, now the wife of
ips, *Anne*, otherwise *Anna*, now the wife of
Bullard, and *Mary*, now the wife of *Edward*

ıe three children of *Thomas Charlton* were
he death of *Samuel Charlton*, and are now
they and their husbands by the proper means
the conveyance of freehold estates by *femes*
ıveyed the tenements in question to the lessor
ıtiff.

ıtely upon the death of *Samuel Charlton*, his
, *Henry Charlton*, entered into possession of
ınts in question, and continued in such pos-
his death in *January* 1838, intestate, leaving
ant, his eldest son and heir at law.

death of *Henry Charlton*, the defendant
o and has ever since been in possession of the
in question.

stion for the opinion of the court was, whether,
circumstances stated, the lessor of the plain-
itled to recover, in the said action of ejectment,
nts in question. (*a*)

points marked for
:re:
essor of the plain-
ınder the said will,
ı kinsman, *Samuel*

Charlton, took an estate tail, or other estate of inheritance, in the tenements in question, immediately expectant on the deaths of the said testator's

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Stephen, Serjt., for the lessor of the plaintiff. It is submitted, in the first place, that *Samuel Charlton* took an estate tail under the will in question. The court is aware that the effect of the words "for want of such issue," which occur in this will, has been materially altered and restricted by the recent statute 7 *W.* 4. & 1 *Vict. c.* 26. *s.* 29. Although that act does not apply to the present will, it confirms the position which is to be deduced from all the authorities, that these words import an indefinite failure of issue, and that their operation was to give *Samuel Charlton* an estate tail. The rule is clearly laid down, that where a will contains an antecedent devise to all the children of a party for an estate of inheritance, the term "issue" in the devise over does not import an indefinite failure of issue, but refers to the issue before mentioned; 2 *Powell on Devises, by Jarman*, p. 537. The reason of the rule is evident, for as all the children will take under the antecedent devise, there is no necessity to give the word issue a larger meaning. But where all the children are not mentioned in the preceding devise, the word "issue" cannot be held to be referential to the objects before named, as in that case some of the children would be omitted; *Ibid.*, p. 551, 552. In this will the antecedent devise only embraces the eldest son and the daughters, and such eldest son is apparently only to take for life; consequently, the word "issue" cannot be understood as referring to him and the

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widow *Ann Baker*, and his brother *Richard Baker*; or that *Thomas Charlton*, the eldest son of the said *Samuel Charlton*, took an estate tail or other estate of inheritance in the tenements in question, immediately expectant on the deaths of the said *Ann Baker*, *Richard Baker*, and *Samuel Charlton*.

For the defendant, — that the estate vested in the eldest or only son of the testator's kinsman, *Samuel Charlton*, living at *Samuel's* decease (viz. *Henry*, the defendant's father), in tail or in fee-simple.

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daughters, as by that construction no provision would be made for a second or any other sons, or for the issue of the eldest son. The present case is to be argued rather on principle than on authority, as there is no case precisely in point, although there are several which bear strongly upon it. In *Doe dem. Bean* v. *Halley* (*a*), where the testator devised to his nephew *A.* and his assigns for life, and after his decease to the eldest son of *A.*, and the heirs of such eldest son, upon condition that such eldest son be christened and called by the name of *F.*, "and *in default of issue male* of his said nephew," unto his nephew *B.*, and his eldest son in like manner, and, *for want of such issue*, to the devisor's own right heirs; it was held that *A.* took an estate for life, remainder to his eldest son in tail male, with remainder to *A.* in tail male. That case is so far apposite to the present, that the estate of inheritance given to the eldest son of *A.* was cut down to an estate tail to effectuate the testator's general intention, that all the male issue of *A.* should take before *B.* and his issue. So here, if it be held that *Samuel Charlton* took an estate in tail general, effect will be given to the whole devise; for this testator evidently had in his view the devolution of an estate tail, and meant that the eldest son from time to time should take before the daughters; the sons being to succeed according to the law of primogeniture, and the daughters as tenants in common. In *Stanley* v. *Lennard* (*b*) lands were devised to trustees in fee, upon trust to permit *S. L.*, the eldest of testator's two natural children, to receive the rents for his life, and after his decease to permit the *eldest son* of *S. L.*, and the issue male of *such eldest son*, to receive the same; and, *for want of issue of the said S. L.*, to permit testator's second son, &c.; and the testator directed that

(*a*) 8 *T. R.* 5. (*b*) 1 *Eden*, 87.

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his son *S. L.* should have the use of his pictures for his (*S. L.*'s) life, and after his decease to his issue, and the issue of his issue, and *for default of issue of S. L. then* to *T.*, &c. It was held, by Lord *Northington* that *S. L.* took an estate tail under the will by necessary implication. In *Wight* v. *Leigh* (*a*) a testatrix devised all her real estates in *Surrey* to her husband *J. C.*, in case he survived her, during his life; and after her husband's decease, she gave the said *Surrey* estate to the plaintiff, and after his death she gave the same to his first and other sons, and, *in default of male issue*, then she gave the said estates unto the eldest and other daughters of the plaintiff, and to their *heirs male* for ever, on condition that they should take the name of *W.* and no other. Sir *W. Grant* held that the plaintiff took an immediate estate tail. That case approaches closely to the present; there being an express devise to the first and other sons, notwithstanding which it was ruled, in effect, that they only took through the father as tenant in tail. In *Reece* v. *Steel* (*b*) a devise to *A.* for life, and to her heirs, the issue of her body, for ever, for their lives, and in case *A.* has no son, then to her eldest daughter, followed by a proviso containing a devise over if *A.* left no issue, or they should become extinct, was held to create an estate tail in *A.* In *Parr* v. *Swindels* (*c*) a gift of real estate to *A.* for life, with remainder to her children as tenants in common, and in case *A.* should die without leaving lawful issue, then over, was held to be a gift to *A.* for life, with remainder to her children for life, with remainder to *A.* in tail. In *Doe dem. Dacre* v. *Dacre* (*d*), it was held that the words "in default of such sons" were to be understood as meaning "failing the limitation to the sons." The cases all shew that the courts, in giving

(*a*) 15 *Ves.* 564.
(*b*) 2 *Sim.* 233.
(*c*) 4 *Russ.* 283.
(*d*) 1 *B. & P.* 250.

effect to the words "in default of issue," have not hesitated to interfere with the preceding limitations. In *Doe dem. Blandford* v. *Aplin* (*a*) a devise to "*A.* for life, and after his decease to and amongst his issue, and in default of issue," then over, was held to give *A.* an estate tail. *Mortimer* v. *West* (*b*) is to the same effect.

Secondly, at all events *Thomas Charlton*, the eldest son of *Samuel*, took an estate of inheritance in fee simple. Supposing the court to reject the construction that the words "for want of such issue," give an estate tail to *Samuel Charlton*—then those words import a contingency, and mean that in the event of there being no eldest son of *Samuel Charlton* living at the death of the testator, the estate shall go to the daughters; consequently, the eldest son would take a fee by implication. Where lands are devised to a party with a limitation over in case he die under twenty-one, he is held to take a fee by implication; 2 *Powell on Devises*, by *Jarman*, 395. And the rule was decided to be the same where the limitation over was in the event of death under eighteen years. *Doe dem. Elsmore* v. *Coleman.* (*c*) The same doctrine is to be found in *Frogmorton dem. Bramstone* v. *Holyday.* (*d*)

Atcherley Serjt. for the defendant. It is contended, that under the will in question, *Samuel Charlton* took an estate in tail male, with remainder to his daughters, as tenants in common, in tail general, remainder to *Samuel Charlton* in tail general, with an ultimate remainder to him in fee; and that on his death the estate devolved on *Henry* the second son, under such estate tail male, to the exclusion of the daughters of the eldest son. It evidently was the intention of the devisor, first, that all the issue of *Samuel Charlton* should take under the de-

(*a*) 4 *T. R.* 82.
(*b*) 2 *Sim.* 274.
(*c*) 6 *Price*, 179.
(*d*) 3 *Burr.* 1618.

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vise; and, secondly, that the male issue should succeed before the female; and to effectuate the latter intention, the word son in this will is to be construed as a word of limitation, and as synonymous with male issue. In *Bifield's* case (*a*), under a devise to *A.*, and if he died not having a son, the word "son" was taken to be used as *nomen collectivum*, and the devise was held to be an estate tail. So, in *Milliner* v. *Robinson* (*b*), where a testator devised to his brother *J.*, and if he should die having no son, that the land should remain over, it was held that *J.* had an estate tail. In *Robinson* v. *Robinson* (*c*) the testator devised his real estate to *L. H.* for and during the term of his natural life, and no longer, provided he altered his name and took that of *Robinson*, and lived at his house at *B.*, and after his decease *to such son as he should have, lawfully to be begotten*, taking the name of *Robinson*, and for default of such issue, then over to *W. R.* in fee; and after willing that *W. R.* might present whom he pleased to any vacancy in any of the testator's presentations during his (*W. R.*'s) life, and that bonds of resignation should be given in favour of *W. R.*'s children who were designed for holy orders; and after the same should be disposed of as aforesaid, then the testator gave the perpetuity of the presentations to the said *L. H.* in the same manner and to the same uses as he had given his estates. The judges of the court of King's Bench (*d*), on a case sent to them by Lord *Hardwicke*, certified their opinion that *L. H.* "must by necessary implication, to effectuate the manifest general intention of the testator, be construed to take an estate in tail male." The Lords Commissioners who succeeded Lord *Hardwicke* in the

(*a*) Cited by *Hale* C. J. in *King* v. *Melling*, 1 *Ventris*, 231.

(*b*) Sir *F. Moore*, 682.

(*c*) 2 *Ves.* Sen. 225.; 3 *Atk.* 736.

(*d*) 1 *Burr.* 38.

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e seals, confirmed this certificate; and their affirmed after great consideration in the ords. (*a*) In *Mellish* v. *Mellish* (*b*) the de- ese words: "*Hamels* to go to my daughter lows; *in case she marries and has a son, to* ; in case she has more than one daughter , or her husband's death, *and no son*, to go t daughter; but in case she has but one no child at that time, I desire it may go to *W. M.*" In a subsequent part of the will the d, "Mrs. *P.* to receive 200*l.* a year from the life of Mrs. *P.*" On a case sent to Bench by the Lord Chancellor, that court at *C. M.* took an estate in tail male with a fee, (she being heir at law,) subject to other d by the will." In *Chorlton* v. *Craven* (*c*) the o *T. C.* during his life, with remainder to in tail male lawfully begotten, severally and and for want of such issue either of his d his son *J. C.*, then the testator devised to s and their children share and share alike, them and their heirs for ever as tenants in d not as joint tenants: it was held that *T. C.* e in tail male. (*d*) *Doe dem. Garrod* v. *Gar-* ery strong case. There, under a devise to *G.*, and to his eldest son, if he had one, but n over, it was held that the son of *T. G.* took male. In *Dubber* v. *Trollop* (*g*), where the ng five sons, devised the manor of *C.* to his

n's P. C. 180.; ler the name of *Vicks.*
C. 520.; 3 *D.*
y *Preston, argu- sh* v. *Mellish.* *. & C.* 524. it is only stated generally that *T. C.* took an estate tail; but in 3 *D. & R.* 808. it is said to have been held that he took as tenant in tail male.
(*e*) 2 *B. & Ad.* 87.
(*g*) Cited in *Minshull* v. *Minshull*, 1 *Atk.* 412.

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eldest son *William* for life, and after his decease, to the first heir male of his body; it was held that *William* was tenant in tail. *Fitzgerald* v. *Leslie* (*a*) is to the like effect. So in *Langley* v. *Baldwin* (*b*) a testator devised certain lands to *A.* for life, with power to jointure, and after his death to the first son of *A.* in tail, *and so on to the sixth son only*, and then devised that if *A.* should die without issue male, the land should remain to *J. C.* It was held that *A.* took an estate tail, as there was no limitation beyond the sixth son, and there might be a seventh, who was not meant to be excluded. In this case, if *Samuel Charlton* be not considered as taking an estate in tail male, the gift to the daughters is quite unnecessary, for they would take, as a matter of course, under an estate in tail general. The very devise to the daughters therefore shews that the preceding devise was intended to be an estate in tail male. It is clear that the male issue was to be preferred. [*Maule* J. It is clear that the sons were to be preferred to the daughters, but that intention would be accomplished by giving *Samuel Charlton* an estate in tail general.] It is submitted that the true construction of this will is, that he took an estate in tail male, with remainder to his daughters as tenants in common in tail general, with remainder to himself in tail general, nearly approximating to the form of settlement given in 2 *Saunders on Uses*, 157, 158.

Stephen Serjt. in reply. There is no pretence for saying that this testator meant to make a strict settlement. If that had been so, there ought to have been cross remainders among the daughters in order that the whole of the estate might go over at the same time; and

(*a*) 3 *Brown's P. C.* 154., *Toml.* ed. pl. 29.; 1 *Ves.* Sen. 292.; *S. C.* cited 1 *P. Wms.* 759.

(*b*) 1 *Eq. Ca. Abr.* 185.

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nission of such cross remainders shews clearly was not intended to devolve in the manner sug- by the other side. All the authorities which ıeen cited on the part of the defendant, with the ion of *Chorlton* v. *Craven*, are cases of a devise to a nerally, and not to an eldest son, as here. With t to *Chorlton* v. *Craven*, it is observed in 2 *Powell ises, by Jarman*, 535., that "the case is much too stated, to enable us to draw any satisfactory con- ı from it." The construction contended for on ıer side cannot be adopted without throwing aside ise to the eldest son. Although an estate tail ometimes be inferred, no authority can be pro- for giving successive estates tail to the same per- suggested on the part of the defendant.

DAL C. J. This case, as it appears to me, de- on whether we are authorised to interpret the which first occur in the will, "for want of such to mean, "for want of such issue male;" for if ɛ cannot introduce into the devise the estate in le contended for on behalf of the defendant. It lenied that the words at the end of the devise, "in ıy said kinsman have no issue," are sufficient to ı estate in tail general by implication to *Samuel m.* That we may see whether the words relied the defendant will create an estate in tail male, st look at the order in which they occur in the The testator, after giving life estates to his wife :other, devises as follows; "and from and after ɛease of my said brother, I give &c. the aforesaid ıge, &c., unto my kinsman, *Samuel Charlton*, of &c. e and to hold, &c. for and during the term of his l life; and from and after his decease, I give and ıth the said messuage, &c. to the eldest son of my insman, *Samuel Charlton;* but for want of such

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issue, then to his daughter or daughters, share and share alike for ever." *Primâ facie* the devise being to the eldest son alone, the words "for want of *such* issue," would not of themselves imply an indefinite failure of issue. It appears to me, that in no case cited, with the exception of *Chorlton* v. *Craven*, has there been that strict reference to one single individual, which occurs in this will. In *Byfield's* case, there was no devise to any particular son. So in *Milliner* v. *Robinson*, the devise was general, being to the testator's brother *John*, and if he died, "having no son" then over. So in *Robinson* v. *Robinson*, the devise was not to any particular son of *L. H.*, but "to such son as he should have." Again in *Mellish* v. *Mellish*, the testator does not refer to any particular son of his daughter, but says, "in case she marries and has a son, to go to that son." In *Doe dem. Garrod* v. *Garrod* there were terms which pointed so clearly to an estate in tail male, that there could be no doubt. In *Chorlton* v. *Craven*, where the devise was to *J. C.* during his life, with remainder to his first son in tail male lawfully begotten, severally and successively; in holding that *T. C.* took an estate tail, considerable weight was probably attached to the expressions "severally and successively." In this case the estate is limited and confined by the terms of the will to the eldest son, and the devise proceeds, "but for want of such issue then to his daughter or daughters, share and share alike, for ever; but in case my said kinsman have no issue, then to hold to him, his heirs and assigns for ever." I must say that it would be a very cumbrous interpretation of this devise, if we were first to imply an estate in tail male in *Samuel Charlton*, and afterwards to ingraft upon that an estate in tail general. It appears to me that the proposition contended for by the defendant is not borne out by the cases which have been cited, and

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judgment must therefore be for the lessor of the ntiff.

Coltman J. It seems to me that the words, "but case my said kinsman have no issue, then to hold to n, his heirs and assigns for ever," authorise us in ing that *Samuel Charlton* took an estate tail under s will. The effect of such a construction, unubtedly, is to make the intermediate devises to the est son and daughters inoperative; but the cases *Doe dem. Blandford* v. *Aplin* (*a*), and *Reece* v. el (*b*), shew that the implication arising from those rds is so strong as to get over any difficulty of that nd. *Doe dem. Blandford* v. *Aplin* was a very strong se: there the devise was "to *A.* for life; and after decease, to and amongst his issue; and in default of ue," then over; and the effect of holding that *A.* took estate tail was completely to alter the operation of devise to his issue. So, in *Reece* v. *Steel*, where the vise was to *A.* for life, and to her heirs, the issue of r body, for ever, for their lives, and in case *A.* had son, then to her eldest daughter, followed by a oviso containing a devise over if *A.* left no issue, or y should become extinct; the effect of holding that took an estate tail, would be to give the estate to all daughters, contrary to the express intention of the tator. Assuming that *Samuel Charlton* took an estate l under this will, the only question is, whether it was estate in tail general, or in tail male. It appears to , that the distinction pointed out by my brother *phen*, and adopted by my Lord Chief Justice, is well nded; that the cases in which the word "son" has n held to give an estate in tail male, were cases ere "son" was used indefinitely, and not as here, with

(*a*) 4 *T. R.* 82. (*b*) 2 *Sim.* 233.

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reference to a particular son. The only excep *Chorlton* v. *Craven*, where the words of the devi very peculiar, and if it had been held in tha that *Thomas Chorlton* took an estate in tail i should have said, that the terms of the devise ns led to that conclusion. But if we are to infer fr statement in *Barnewall* and *Cresswell's* Reports (a *Thomas Chorlton* was held to take an estate general, the case is no authority for the positic tended for on the part of the defendant. Much venience would result from the construction att to be put upon this devise by my brother *At* It would give an estate by descent to the sons, purchase to the daughters: and no authority ha adduced to warrant us in implying two estates tai same person, as has been suggested.

Erskine J. If the court had been left to as the intention of the testator from the will itself, reference to the cases on the subject, it might nc been easy to say what his intention was, so as precise effect to the terms employed. For it wo difficult to determine with certainty whether he the estate to go from the eldest son of *Samuel C* to the daughters, or that the second son should before it went to the daughters. I should hav however, looking at the will alone, that he intend *Samuel Charlton*'s eldest son should take up father's death, and then his children, and then th second son and his children should succeed, default of the sons leaving issue, that the estate go to the daughters. If that were so, the effect be to give *Samuel Charlton* an estate in tail g But there are in this will words to which the

(a) 2 *B.* & *C.* 524., but see *antè*, p. 437.

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have attached a definite meaning, namely, "in case my said kinsman have no issue, then to hold to him, his heirs and assigns, for ever." These words, when found unaccompanied by other expressions to control them, have been held to confer an estate tail generally. Other words may be used in a will, of a qualifying character, so as to shew the court that the testator did not mean to give simply an estate tail. The question, therefore, is, whether there are any words in this devise that will qualify the clause I have quoted, and create an estate in tail male and not in tail general. Now the limitations after the death of *Samuel Charlton* are "to his eldest son," and "for want of *such* issue" to his daughters; and it is said, on the part of the defendant, that the latter words clearly refer to male issue, and consequently confer an estate in tail male; and a number of authorities have been cited to shew that the courts have given such an interpretation to similar language. In all those cases, however, with one exception, the devise was to a son generally, and not to any son specifically. From the note of *Chorlton* v. *Craven* it does not appear whether the party was held to take an estate in tail male; but, if it had been so decided, there were words in the devise which seem to point to such an estate rather than to an estate in tail general. In *Doe dem. Garrod* v. *Garrod* there was a manifest intention that the estate should go to the male issue only. In all the other cases cited, an intent to give the estate to the sons generally was clearly indicated. Here, the testator has expressly limited the estate to the eldest son of *Samuel Charlton*, and, in default of such issue, has given it to the daughters; which, according to the construction of the defendant, would entitle them to take before the daughters of the eldest son. I think we cannot infer that the testator had such an intention, but that the

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better construction of the devise is that *Samuel Char* took an estate in tail general.

Maule J. I am of opinion that *Samuel Charl* took an estate in tail general. It is agreed on bo sides that an estate tail is to be implied in him from t concluding clause in the will, notwithstanding that the is a previous express devise to him for life. But it is co tended, on the part of the defendant, that in additio and prior, to such an estate in tail general, an estate tail male is given; and for this position the defendant r lies on the limitation "unto the eldest son of my said kin man, *Samuel Charlton;* but for want of such issue, th to his daughter or daughters," which words, it is argue are sufficient on the authority of the cases cited, to crea such estate in tail male by implication. I do not thi that those cases support that proposition; for the distin tion which has been pointed out by the Lord Chief Ju tice shews, that these words, even if they stood alone, a capable of a different construction. But the devise to t daughters is followed by the words "share and sha alike for ever," which the defendant, according to l construction, would exclude. It seems to me to be much more reasonable mode of construing this will, hold that an estate tail is given by all the words us than to say that it is conferred by some to the exclusi of others. I think that my brother *Stephen* has succes fully shewn that, in implying an estate in tail general *Samuel Charlton*, full effect may be given to the testato intention. There are many inconveniences which wou result from holding that *Samuel Charlton* took an esta in tail male.

Judgment for the plainti

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Where the plaintiff, in an action of trespass, was a man in humble circumstances, and it appeared that the action was brought at the instigation and costs of his landlord, the court stayed the proceedings until the latter gave the defendant security for his costs.

THIS was an action of trespass, and *Shee* Serjt., in the course of last term, obtained a rule calling upon the plaintiff and one *William Boards* to shew cause why the latter should not give security for the defendant's costs. The motion was grounded upon the affidavits of the defendant and those of two clerks of his attorneys, stating facts tending to shew that *Boards* had instigated the action, which was conducted by his attorneys, and that the plaintiff was his tenant, and a person in humble circumstances. The affidavits of the clerks set forth conversations held with the plaintiff, wherein he was alleged to have admitted that he had no interest in the action, but had signed the authority for bringing it at his landlord's request, without being aware of the object of the document, which, had he known its nature, he would not have signed.

Wilde S. G. now shewed cause, upon the affidavits of the plaintiff and *Boards*. The plaintiff, in his affidavit, gave a direct contradiction to the affidavits on the other side, both with reference to the alleged conversations and the admissions stated to have been made by him; asserting that, although he had the concurrence of his landlord in bringing the action, he acted voluntarily, and on his own behalf, and to protect his own rights and interest as tenant of the premises in respect of the trespass on which such action was commenced. The landlord, in his affidavit, stated that his reason for countenancing the action by his tenant was a belief that, if the plaintiff submitted to the trespass which had been committed, the defendant would repeat it, and

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would take advantage of the poverty and fo of the plaintiff to use his own illegal conduct a of legal right; and that he (the landlord) had s the proceedings, from a conviction that they cessary to protect the plaintiff in his posses from feeling that he ought not to be denied reason of his poverty.

It is submitted that the fact of the plain assisted by his landlord is not a sufficient g compelling the plaintiff to find security for neither is the circumstance that the landlor responsible to his own attorneys for the plain a reason why the landlord should give such se is alleged that the action is brought in the na tenant for the benefit of the landlord, but it i gested that the latter can derive any advan the proceedings, or that they involve any q title.

Shee Serjt., in support of the rule, conten clear that the action had been brought at the i of the landlord, and that the case fell withi laid down in *Hearsey* v. *Pechell.* (*a*) *Ti* there said, "The real question is, whether t action of the plaintiff, or substantially the acti *Wood?* If it were an action which the plain not have brought but for the instigation an nance of *Wood*, the case would fall within the of *Tenant* v. *Brown* (*b*), and another case in of King's Bench, where a master was compell costs for his servant, whom he had put for defendant instead of himself."

(*a*) 5 *New Cases*, 466.; 7 *Scott*, 477.

(*b*) 5 *B.* & *C.* 208. And see *Berkeley* v. *Demery*, 5 *M.* & *R.* 442.; 10 *B.* & *Thrustout* v. *Nixon* 112.; 5 *M.* & *R.*

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L C. J. Taking the whole of the affidavits I cannot help thinking that this is really and lly the action of the landlord, and that the gs ought to be stayed until he shall give or the costs.

st of the court concurring,

Rule absolute (*a*).

ie Court will not make eplevin, that he, in : the defendant avows nizance), should en- ule to pay costs; for have been made a he action." *Anon.* h, 242.

y, if, in an action of replevin brought by *A.* against *B.*, *B.* avowed the taking of the goods of *A.*, as a distress for rent due to *A.* from *C.*, *C.* might make himself a party to the action, and plead, jointly with *B.*, in bar of the avowry. *Dodingham* v. *Phipher*, *H.* 1. *E.* 2. *Maynard*, 3, 4.

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The Same *v.* ARNETT, &c. &c.

An act incorporating a joint-stock company directs that the company shall, from time to time, cause the names, additions, and places abode of the several persons entitled to shares in the undertaking, with t number of shares which they are respectively entitled to hold, and the amount subscriptions paid thereon, and the number by which each share shall be d tinguished, to be entered in a book *to be kept* by the secretary of the compa and that, in an action for calls, the production of the book in which the secret is directed by the act to enter and keep a list of the names, additions, a places of abode of the several proprietors of shares, with the number and sha which they are respectively entitled to hold, shall be *primâ facie* evidence prove the defendant a proprietor, and the number and amount of his shares.

In an action against *A.* for calls, it is no objection to the admissibility of book produced, as the book kept under the act, to prove him a proprietor, tha irregularity or omission is shewn to exist with respect to the entries in the relating to other shareholders; the provisions as to the entries to be made i book being directory only and not essential.

Such an enactment does not require that the entries should be made secretary with his own hand.

The statute also directs that the directors of the company shall keep a minute and entry of the orders and proceedings of every meeting of the d which shall be signed by the chairman at each respective meeting, and minutes and entries of the respective meetings, when so signed, shall b original orders and proceedings, and shall be allowed to be read in without proof that the meetings were duly convened, or that the perso or entering such orders or proceedings were proprietors or directors o pany. Held, that signature of the minutes of the meeting by the the following meeting at which the same chairman presides, is suffici

The statute having given power to *the directors* of the company t it was held that the power might be exercised by *the court of directo* appearing to treat the terms, "the directors" and "a court of equivalent expressions.

Where a statute empowers a joint-stock company, in actions holders for calls, to declare and allege that the defendant, being a many shares, is indebted to the company in such sum of money arrear amount to, for so many calls of such sums of money upo belonging to the defendant, whereby an action hath accrued to the c of the act, without setting forth the special matters; and that on t tion, it shall only be necessary to prove that the defendant, at the t

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y. The declaration against *Richards*, (and in seven- n other actions, varying only as to the amount of calls) eeably to the form given by the act, stated that the de- dant, on &c. being a proprietor of divers, to wit, forty ıres in the undertaking mentioned in a certain act of rliament, made and passed in the sixth year of the gn of King *William* the Fourth, intituled "An act for ıking and maintaining a dock or docks at *Southamp-*, " was indebted to the said company in 100*l.*, for one l of 2*l.* 10*s.* upon each of the said shares in the said dertaking, belonging to the defendant, whereby an ion hath accrued to the said company, by virtue of said act of parliament, to demand and have of, and m, the defendant, the sum of 100*l.* above demanded: the defendant, although often requested so to do, hath as yet paid the sum of 100*l.* above demanded, or part thereof; to the damage of the said company 100*l.* Plea: *nunquam indebitatus.*

At the trial of the first action (*a*), that against *Richards* ore *Erskine* J. at the sittings at *Guildhall* in last *Michaelmas* term, the following facts appeared.

Richards, being an original subscriber, was named the Dock Act as one of the persons thereby incor- ated. The course of proceeding before the passing the act was this: Upon the payment by a party he deposit upon the shares allotted to him, a receipt given, signed by the bankers, by which the bank- acknowledged that they had received the amount, from the party paying, but from the company.

of such respective calls, was a proprietor of such shares as such action is brought in respect of, and that such calls were in fact made, and that notice thereof was given as directed by the act, without proving the appointment of the directors who made such call, or any other matter whatsoever, and that the company shall thereupon be entitled to recover what shall appear due, including interest at 5

cent: the proper course is for the company to declare for the bare amount of calls, and for the jury to add the interest (*qu.* as debt, or as damages (*b*)). It not necessary to insert a count for interest; nor ought the amount of the interest be added by the plaintiffs to the calls, and declared for as part of the calls.

(*a*) In a similar action, *Colt-* n J. having directed the jury ngly for the defendant, a of exceptions was tendered, which no decision has yet taken place. *London Grand Junction Railway Company* v. *Freeman.*

(*b*) *Post*, 464. 467.

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These receipts were afterwards exchanged at the office of the company for scrip-certificates of shares, numbered in the order in which such certificates were issued. After the passing the act the holders of these certificates brought them to the office to be registered, in a book called the Register Book, whereupon new numbers were assigned to the shares in the order in which the certificates were presented, and a certificate of registry was delivered out in exchange for each scrip-certificate presented. The shares of some proprietors were entered in this book without any register number being assigned to them, such shares not having been presented for registration. This book was not kept by the secretary to the company, but by the clerk, *Bolger*, who was the witness called to prove the formal parts of the plaintiffs' case. It also appeared that the addresses of many of the shareholders were omitted in this book. For the defendant it was objected that as this was a peculiar statutory species of proof, the requisitions of the enactment must be strictly complied with. The objection was overruled, on the ground that the clause requiring those matters was merely directory.

To prove the call of 2*l.* 10*s.* per share, the minute-book of the company was produced by *Bolger*, the clerk, kept agreeably to the 75th sect. of the act. The minutes of the proceedings of the 18th and 20th of *July*, 1837, were read as follows: —

"*Southampton Dock Company*,

"Court of Directors, *Tuesday*, 18th *July*, 1837.

"Resolved, That a call of 2*l.* 10*s.* per share be made, payable on such day in the course of the following month of *August*, as shall be determined upon at a future meeting of the court.

(Signed) "*R. Heathfield*, Chairman."

"*Southampton Dock Company*,

"Court of Directors, *Tuesday*, 25th *July*, 1837.

"Resolved, that the resolution of the court, held on

the 18th instant, be altered from a day in the month of *August* to the 8th of *September* next, and that a call of 2*l.* 10*s.* per share, payable on the 8th *September* next, be made accordingly.

(Signed) "*R. Heathfield*, Chairman."

The usual course of proceeding at the courts of directors was, for the chairman to take rough notes of the proceedings, and to hand them to the clerk after the meeting was over. Before the next meeting, these notes were transferred by the clerk to the minute-book, and were at the next meeting read over and approved and signed by the then chairman. (*a*) The rough notes were not produced. It was objected that the minute-book was inadmissible, on the ground that the signature of the person who was chairman of the meeting at which such proceedings took place was not attached to the minutes at the meeting, as required by the seventy-fifth section. This objection was also overruled; and a verdict was returned for the plaintiffs for 111*l.* 10*s.* without distinguishing between debt and damages.

The second action was tried before *Coltman* J. at the sittings at *Guildhall* in last *Hilary* term. *Arnett* held twenty shares, to which no register numbers had been prefixed as directed by the eighty-ninth section. (*b*) Register numbers were applied to the shares held by *Arnett* and others, after action brought,

(*a*) *R. Heathfield*, having signed the minutes of the meeting of the 18th *July*, would be the person who was chairman on the 25th, the day on which the call was effectually made. *Sed vide* 8 *A.* & *E.* 266.; 3 *N.* & *P.* 351.

(*b*) Which enacts, "that the company shall cause the names of the several corporations, and the names and additions and places of abode of the several persons, who shall be from time to time respectively entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to hold, and the amount of the subscriptions paid thereon, and also the proper number by which every such share shall be distinguished, to be fairly and distinctly entered in a book *to be kept by the secretary* of the company; and that every pro-

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but before the trial. Under the column headed, residence, "agent at the custom-house" was set against *Arnett*'s name. The same objections were taken by *Bompas* Serjt., for *Arnett*, as had been taken by *Talfourd* Serjt., for *Richards*. It was also objected, by *Bompas* that the entry under the head, residence, being applicable only to the carrying on of a business, and not to the place of *Arnett*'s abode, was insufficient; and also that the power of making calls was in the directors at large, and not in the court of directors; and also that the register-book had not been kept by the secretary, as required by the eighty-ninth section, but by the clerk, who stated that he acted under the secretary, having the care and custody of the minute-book, in which he made the entries according to directions received from the secretary. It was also objected that, as the declaration contained no count for interest, none could be recovered. The learned judge overruled these objections, but gave the defendant leave to move to enter a nonsuit. A verdict was taken in this action for 55*l.* 1· 9*s.* for calls and interest, without distinguishing between debt and damages.

A verdict was also taken for 27*l.* 19*s.* in an action against *Smith*, subject to a motion for a nonsuit in both actions: in the remaining cases the records were withdrawn upon an arrangement that, if the verdict against *Arnett* should stand, judgments should be entered for the plaintiffs in those actions.

Talfourd Serjt., in *Michaelmas* term, for *Richards*, obtained a rule nisi for a new trial, and *Bompas* Serjt. in *Hilary* term, for *Arnett* and *Smith*, obtained a rule

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prietor of the said undertaking, or, in the case of a corporation, their clerk or agent duly appointed, may, at all convenient times, have recourse to, and peruse, the same, gratis, and may demand and have copies thereof, or of any part thereof, paying to the company at the rate of 6*d.* for every 100 words.

nisi on the points reserved, to enter a nonsuit. Against which

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Wilde S. G., and *F. Kelly*, now shewed cause. The first objection is that there was no sufficient evidence of proprietorship, the book containing the registration having been improperly received. Secondly, that the minute-book was not admissible. These two objections are those relied upon, for a nonsuit. Thirdly, it is objected, that under this form of declaration, interest was not recoverable. The admissibility of the register-book depends on the eighty-fourth section, by which it is provided, "that in any action to be brought by the company against any proprietor of any share to recover any money due to the company, for or by reason of any call made by virtue of the act, it shall be sufficient for the company to declare and allege, that the defendant, being a proprietor of so many shares in the said undertaking, is indebted to the company in such sums of money as the calls in arrear shall amount to, for so many calls, of such sums of money, upon so many shares belonging to the said defendant, whereby an action hath accrued to the said company by virtue of this act; without setting forth the special matters; and on the trial of such action it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of such shares in the said undertaking, as such action is brought in respect of, and that such calls were in fact made, and that notice thereof was given as is directed by this act, without proving the appointment of the directors who made such call or any other matter whatsoever; and the said company shall thereupon be entitled to recover what shall appear due &c.; and in order to prove that such defendant was a proprietor of such shares in the said undertaking as alleged, the production of the book in which the secretary of the said company is by this act directed to enter and keep a list of the names, and additions, and

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places of abode of the several proprietors of shares *in* the said undertaking, with the number of shares they are respectively entitled to hold, shall be *primâ facie* evidence that such defendant is a proprietor and of the number or amount of his shares therein."

The register-book, if admissible, proved that *Richards* was the proprietor of forty shares. The objection supposes a correct registration of every share to be a condition precedent. The statute points out what shall be averred and what shall be proved. It is not left to inference, whether other matters are to be proved. The statute distinctly states, first what is to be proved, then in what manner that is to be proved. The company are, by the eighty-fourth section (*a*), referred to in the eighty-ninth (*b*), required from time to time, to "cause the names of the several corporations, and the names and addresses of the several persons, who shall be from time to time respectively entitled to, shares in the said undertaking, with the number of shares which they are respectively entitled to hold, and the amount of the subscriptions paid thereon, and also the proper number, by which every such share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the secretary of the company." This is the book that the company profess to keep as the register-book; which book is mentioned in the eighty-ninth section merely to identify it, and was intended to shew the names of the proprietors and the number of shares held by each. The bankers gave receipts which were afterwards exchanged for the scrip-certificates, and it was the duty of the holders to take care that their shares were registered, and to exchange their scrip-certificates for the certificates of registry, which certificates were granted after the act passed. The first objection taken to the admissibility of the book was, that the entries were

(*a*) *Suprà*, 453. (*b*) *Suprà*, 451.

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not written by the secretary with his own hand. Where writing is intended to be by the party himself, it is so expressed. The next objection was, that the names were entered without the numbers appropriated to the shares. The legislature could have had no object in making the whole undertaking void if one or 100 shares were irregularly entered. [*Bosanquet* J. Does the objection apply?] It is submitted, that it does not. In the cases which form the subject of the present actions, numbers are attached to the registration of the shares, and there is no evidence that the persons against whose names no numbers appear, were entitled to any shares. If an act direct that the book shall be evidence for a particular purpose, it is no objection that in a different part of the book unconnected with that purpose, some irregularity may be found. The eighty-ninth section is directory, and does not defeat the rights of any party, if its directions are not complied with. The argument for the defendants must go to this extent, — that if the addition of one of the shareholders be mistaken, no call can be made. In *Rex* v. *Justices of Leicester* (*a*), it was held that affirmative words in a statute do not make its provisions imperative, and that to make the provisions imperative, negative words must be introduced. So, in *Rex* v. *Birmingham* (*b*). In the seventy-fourth and seventy-fifth sections the directors, a court of directors, and a meeting of directors, are spoken of indifferently as the same thing. So, in the seventy-sixth section.

The second objection on which this rule was obtained, is the admissibility of the minute-book, the resolutions not being signed at the same meeting at which they were carried. The first answer to this objection is, that it is a misapprehension to suppose that the act requires that the resolutions shall be signed at the meeting. All

(*a*) 7 *B. & C.* 6.; 9 *D. & R.* 772.; 1 *Smith, L. C.* 170.

(*b*) 8 *B. & C.* 29.; 2 *M. & R.* 230.

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that is directed is, that the resolutions shall be signed by the person who is chairman at the meeting. But, secondly, supposing it to be necessary, the resolutions were signed by the chairman at the meeting. The language of the seventy-fifth section is this: "and the directors shall keep a regular minute and entry of the orders and proceedings at every meeting of the directors, which shall be signed *by the chairman at each respective meeting*, and the directors shall, if required, from time to time produce such minutes to the half-yearly general meetings and to the special general meetings of the company, and shall in all things obey their orders and directions." With respect to the general meetings there are no directions as to when the minutes shall be signed. The object of the act is better accomplished by the minutes being drawn out in form, and signed afterwards. [*Bosanquet* J. The words "signed at the meeting by the chairman" would have made it clear. As it would have been so easy to express what it now contended on the part of the defendants, was the intention of the legislature, the court will not transpose the words, for the purpose of giving effect to such an objection. No security could be contemplated, because is not required in other cases. [*Maule* J. The meaning appears to me to be, "unless signed by the chairman, deputy chairman, or other directors presiding at each meeting," giving the same sense to the word chairman as it has in the former part of the same section. *Bosanquet* J. The second description is shorter than the first, the third is shorter than the second. Do not all mean the same thing?] The act directs that the declaration shall be in a particular form, and that so declaring the company shall be entitled to recover interest. Interest therefore forms part of the debt to be recovered, and if the act had contained no such provision, it would have been competent to the jury to give interest in the shape of damages for the detention of the debt. It

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rial whether the plaintiffs recover both the calls, *interest as debt*, or whether the interest is found ages, restricting the "debt" to the calls.

as Serjt., in support of his rule. With respect irst point, there has not been a substantial com- with the requirements of the statute. This is it has been put, a case of *one* omission. Every lder has a right to see the register-book, and tain by inspection who are his co-adventurers, what extent each of them is liable.

respect to the second point, the chairman of a neeting, is chairman of the meeting only so long meeting is assembled. Where a party is re- to do an act in his official capacity, the act must e whilst his official character continues. The e of the seventy-fifth section, though it might s have been made more clear by a slight trans- of the words in the manner suggested, is y intelligible. The seventy-fifth section (*a*) must in connection with the fifty-fourth, which directs manner meetings shall be held.

n the third point, no action of debt could be ned for this interest except under the statute. are two modes of suing for the interest, it may uded as part of the money due for calls, or it declared upon in a separate count: neither of ourses has been pursued.

ourd Serjt., in support of his rule for the defend- *nett*. The first question for the consideration of the is, whether the plaintiffs produced legitimate evi- of proprietorship in the defendant. The act says, e registration shall be *primâ facie* evidence; but impossible for a defendant to prove the negative,

(*a*) *Vide infrà*, 456.; *infrà*, 461.

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the evidence is, in reality, made conclusive. Should the defendant be a stranger, he would have no means of disproving the truth of the entry. If, indeed, the defendant were a party who had sold his shares, he might be able to rebut the presumption of ownership created by the entry in the register-book. It may be said that it is not probable that the secretary would place the name of a stranger upon the register. So, it is not probable that an action will be brought where there has been no dealing between the parties, or where an assault, of which the plaintiff complains, has never been committed. It is therefore necessary that the provisions of the statute be strictly complied with. The statute, after prescribing what must be done, directs in what manner it shall be done. So much force being given to the book, the court will be satisfied that the book produced in evidence against the defendants, is such a book as the statute contemplates and requires. [*Tindal* C. J. The question is, whether this is *substantially* the book contemplated by the legislature. At the special commission at *Monmouth*, we said, would you contend that if the name or description of a witness is mistaken, other witnesses cannot be examined? So, here, this is not the only mode of proof pointed out by the statute.] The words of the statute are, "The book directed to be kept." Now the book produced may have been made up the day before the trial. No connection was shewn between the book produced, and any book kept by the company, except that it was identified by a director. The name may not have stood in the books of the company at the time the call was made, and in point of fact *Arnett*'s name was not inserted until after the call had been made. [*Maule* J. If the insertion of the name is to be evidence of proprietorship, it is so at the time of the entry. The statute says, that the entry shall be evidence that the party *is* a *proprietor*. *Erskine* J. It was not asked at the trial that

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ld be put to the jury whether the defendant was rietor at the time the call was made. It was, s, well known that the defendant had attended gs of the proprietors, and, consequently, that no could have resulted from entering into such an . The objection taken was to the admissibility ook in evidence. Nothing was suggested as to ct of the evidence if admitted.] The question ther the plaintiffs were not bound to identify all res in the first instance, and then to register the s, so as to shew to any inquirer in whom the in- ras vested. In *The Cheltenham and Great Weston Railw. Co.* v. *Price* (*a*), the act by which the y was incorporated directs, that it shall only essary to prove that the defendant, at the time of such respective calls, was a proprietor of such in the undertaking, as such action is brought in of, or some one such share, and that such was given, as directed by the act, of such calls been made, without proving the appointment of ectors who made such calls, or any other matter er; and the company shall thereupon be en- to recover what shall appear due, including in- on such calls, unless it shall appear that the al moneys previously paid on any such share, er with such call, exceeded 100*l.* on each share, any such call exceeds 10*l.* upon each share, or ade payable before the expiration of three calendar s from the day appointed for payment of the last ing call, or that notice was not given as required act, or that calls amounting to more than 25*l.* en made in some one year; and in order to prove he defendant was a proprietor of such share or in the undertaking as alleged, the production of ok in which the company is directed to enter and

(*a*) 9 *C. & P.* 55.

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keep the names and additions of the several proprietors from time to time of shares in the undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof, or be entitled to shares therein, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein. The book of shares was made up in *September* 1836; a call was made in *October* 1836; the seal was affixed to the book of shares in *November* 1836. Lord *Denman* directed a nonsuit, with liberty to the plaintiffs to move to enter a verdict; but no motion was ever made.

TINDAL C. J. Three objections have been made to the right of the plaintiffs to retain their verdict. First, that the book or register of the names of proprietors was not receivable in evidence; secondly, that the minute-book was not admissible; thirdly, that the allowance of interest by the jury was improper.

The admissibility of the register-book depends upon the proper construction of the eighty-fourth (*a*) and the eighty-ninth (*b*) sections of the *Southampton* Dock Act. The objection taken to the admissibility of the register book was, that the book had not been kept in the manner prescribed by the act. The learned judge, after reading the two sections, said — the question is whether virtually and in substance, the registry-book produced was not the book required to be kept by the eighty-ninth section. There is a very marked distinction between those parts of a statute which are essential and those which are directory only; *Rex* v. *Loxdale* (*c*)

(*a*) *Suprà*, 453.
(*b*) *Suprà*, 451. (*b*).
(*c*) 1 *Burr.* 445. 447.; see *Dwarris on Statutes*, 7

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Though there may be mistakes in the entries relating to other shareholders, still, if the book has been kept honestly and *bonâ fide*, it may be said to be, in substance, the book "directed to be kept." If it were competent to a defendant, in an action for calls, to set up any informality in the entries in the register-book with reference to other shareholders as a defence, great inconvenience would ensue to the company, who would come unprepared to meet the objection founded upon the alleged inaccuracy; whereas no such hardship will be imposed upon a shareholder, who, if he finds the books improperly kept, may set the matter right by a mandamus, by holding that such an objection cannot prevail.

The other objection in support of the motion for a nonsuit is, that it was not shewn that the calls were properly made; — that they were made, not by the general body of directors, but at a "court of directors;" and that, supposing the calls to be properly made, the minute-book produced was not the proper evidence.

Whether a call can be made at a "court of directors" depends upon the construction of the seventy-sixth section, in connection with the seventy-fourth. By the former of these sections it is enacted "that the directors shall have full power, from time to time, to make such calls of money from the several subscribers to, and proprietors for the time being of the undertaking, not exceeding in the whole, including the sum already paid in respect of such shares, the sum of 50*l.* on each share, as they shall from time to time find necessary for the purposes of the company, so that no such call shall exceed the sum of 5*l.* upon each share in the undertaking, and so that the total amount of such calls in every one year shall not exceed 20*l.* upon each share; and there shall be an interval of three calendar months, at least, between every two successive calls." By the

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seventy-fourth section it is enacted, "that the directors for the time being of the company shall meet together at the office of the company once, at least, in every calendar month, and at such other times as they shall think proper, and at such other times as they shall be convened as hereafter mentioned, and each of such meetings shall be styled 'a court of directors;' but no meeting of directors shall be deemed a court competent to enter and determine upon business unless at least three directors shall be present." The seventy-fourth section is supposed to make a marked distinction between the directors and the directors assembled as a "court." Now when three or more are met together, they become a "court of directors." It would be singular that an act which might lawfully be done by three directors, could not be done by the same persons when called a "court of directors." By the seventy-fourth section, "if, on the day appointed for such meeting, a sufficient number of directors to constitute a court shall not attend, the meeting shall be adjourned to the next or some subsequent day by the directors then present, but if none be present, then by the secretary of the company, or such other person as shall attend in his place, and that any director shall be at liberty to call an extraordinary meeting of directors upon such notice and in such manner, and to consist of at least such number, not being less than three, as shall from time to time be provided by the bye-laws of the company, or the orders of the *court* of directors." The presence of a larger number of directors is, it is said, required for the performance of many of the acts authorised to be done by the directors, than is required to constitute a "court of directors." The only instance in which it has been shewn that a greater number than three is required, is the calling of special general meetings of the proprietors under the fifty-fourth section. There appears, there-

o real distinction between "the directors" t of directors," which seem, in the seventy- ther sections, to be used indiscriminately. ntended that the minute-book produced was , inasmuch as it appeared to have been the chairman at a subsequent meeting. act is directed to be done in a prescribed erests of the proprietors would, I think, be d by endeavouring to follow the words of this case, the minutes having been roughly at the meeting at which the orders were ie proceedings took place, were afterwards m by the secretary, and transcribed by a he minute-book, and they were read and id signed by the same person, as the chair- next meeting, who acted as chairman at at which the minutes were taken. The whether the act has been in substance com- The seventy-fifth section requires that the hall keep a regular minute and entry of the proceedings at every meeting of the said hich shall be signed by the chairman at ve meeting." It is said that, by this clause, e of the chairman at the meeting is made a ecedent. My brother *Maule* shewed, in the e argument, that the words "the chairman pective meeting," are only a corresponding pressing "the chairman, or deputy-chair- ier director presiding at each respective be found in an earlier part of the same signature during the meeting had been iecessary, it would have been very easy, by isposition, to have carried out such an in- the clause stands, it does not appear to act calls imperatively on the Court to hold, ature must be attached to the minutes at the

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very time of the meeting. The sixty-third section p this beyond all doubt. If the minutes of the or were signed at the meeting at which such orders w made, the copies of these orders entered on the minu would be original orders without the aid of any leg lative declaration.

The question of interest has been disposed of in course of the argument. When the act of parliam gives the action of debt, it gives all that by the comm law is incident to that form of action, viz., damages the detention of the debt. (*a*)

I am therefore of opinion that the rules should discharged.

BOSANQUET J. Two questions arose at the tri whether the defendant was a proprietor, and wheth the calls had been duly made. The books of t company were produced for the purpose of establishin both those points. The admissibility of the regi ter-book depends upon the eighty-fourth section (b Under the provisions of that section the registe book was received as *primâ facie* evidence of th proprietorship. It was said in one of the case *Southampton Dock Company* v. *Arnett*, that the entry i the register-book was not evidence of the defendan being a proprietor at the time the call was made. I was at least one step towards shewing proprietorship If it was proper evidence to go to the jury, it may hav satisfied them that the defendant was a proprietor at th time the call was made. (*c*) It was objected that th book had not been kept as required by the statute. Th words of the eighty-ninth section are, "to be kept by th secretary;" but by these words it is not meant that all th entries must be made by the secretary. It is sufficien if the entries are made in a book kept under the care

(*a*) *Vide post*, 467. (*b*) *Antè*. (*c*) *Antè*.

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and control of the secretary. It was also objected that the book produced was not the book in which the secretary is directed to enter and keep a list of the names and additions and places of abode of the several proprietors of shares, inasmuch as the whole of these directions had not been strictly followed. The argument goes to this extent, that if there be any one shareholder whose name and address is mis-stated, then the book cannot be received in evidence for the purpose of shewing that the defendant is a proprietor, and the number or amount of his shares. I cannot think that an omission with respect to other names can affect the authenticity of the book as regards names which have been correctly registered.

Next it is objected, that the call was not made by a majority of the directors. The question is, whether "directors" does not mean "the court of directors," appointed for managing the affairs of the company. The sixty-seventh section directs "that the business and concerns of the company shall, from and after the first general meeting, be carried on under the management of sixteen directors, to be chosen from time to time from amongst the proprietors for the time being of the company, and that such directors shall have the management, direction and superintendence, and control of the business and concerns of the company, and the custody of the common seal of the company, with power to use the same on their behalf, and also the custody of the books of accounts, and other books, deeds, and papers, and shall have power to direct the investment, calling in, and laying out, sale and disposal of the stocks, effects, funds, moneys, and securities of the company, and all other the dealings of the company, and to call and appoint the times and places of holding general and other meetings of the proprietors, and to superintend, direct, and control, the correspondence and mode of keeping

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the accounts, and the ascertainment of dividends, a the profits on shares, and to do all other things nec sary, or deemed by them proper or expedient, for c rying on the business and concerns of the company, a to enforce, perform, and execute, all the powers, autl rities, privileges, acts, and things in relation to the co pany, and to bind the company, as if the same w done by the whole corporation, except such as hereby required to be done at some general or spe meeting of the company; and that the directors, for time being, shall have power to frame rules and regu tions, and prescribe the orders and directions, for c rying on the business and concerns of the company, a alter and vary the same, from time to time, as they, their discretion, shall think fit; and all such rules a regulations shall have the force of bye-laws, provid the same be not repugnant to any of the provisions this act, or to any bye-law which may have been dul passed at any general or special meeting of the propri tors of the company, and that no individual proprieto not being a director, except as hereinafter provide shall have a right to any interference, management, di rection, or control in or over the business and concern of the company, or the capital stock or effects thereof."

The seventy-fourth section directs, that the director of the company shall meet together, at the office of th company, once in every month, and at such other time as they shall think proper, and at such other times a they shall be convened as therein mentioned; and tha each of such meetings shall be styled a Court of Di rectors; but that no meeting of directors shall b deemed a court competent to enter and determine upo business, unless three of the directors be present at th commencement of the business, and when their decisio takes place. The seventy-sixth section directs, tha calls shall be made by the directors. The seventy

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eighth section enacts, that the said directors shall have full power and authority to direct and employ the works and workmen, and regulate the use of the said dock or docks, and the amount of them. In respect of the several acts required to be done by the directors in this section, it is manifest that the term directors must mean court of directors. A call, therefore, made by the court of directors, is a call made by the directors.

It is objected, that the making of the calls was not proved, the only evidence being the minute-book, the statute having required that the directors should keep a regular minute and entry of the orders and proceedings at every meeting of the directors, to be signed by the chairman at each respective meeting. By this, nothing more appears to be meant than that the signature, by which the minutes are authenticated, shall be that of the director who presides at the particular meeting, not that the signature shall be attached at the meeting at which the proceedings take place.

I think the plaintiffs are entitled to recover interest.

MAULE J. I am also of opinion that these rules ought to be discharged. The object of the eighty-fourth section was, that very little evidence should be necessary, and that very little expense should be incurred, in enforcing the payment of calls; because persons who take shares in these undertakings, undertake to pay the calls upon them. Great part of the funds of the company might be expended in enforcing the calls, but for such a provision.

The statute is perfectly clear as to what shall be stated in the declaration, and under that statement interest will form a part of the debt (*a*) to be recovered. It is said, that the entry in the register-book only proves that the defendant was a proprietor of shares at the

(*a*) *Vide antè*, 449. 464.

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time the entry was made. To this it is answered, a correctly, that the objection was taken, not to the effe of the entry in the book, but to the admissibility of t book in evidence. If an objection had been taken the effect of the entry, it must have been left to the ju the plaintiffs might have gone on to shew that the fendant attended meetings of the shareholders. Wh ther the book produced answered the description in statute, must be determined with reference to the eigh fourth section.

If the book produced, was the book intended to kept by the secretary under the provisions of the act is sufficient. Here, there is no pretence for say that the book was not kept *bonâ fide*. The paying of the subscriptions is the foundation of all the rig of the parties. The subscribers, if they think it wo while, may correct any irregularity of internal mana ment. It would be most unjust if individual sha holders had the power of defeating the right of company, to recover that which they are entitled some way or other to receive. If the calls were fact made, no irregularity would, I think, vitiate proceedings in an action to recover the amount of in arrear.

A doubt was raised whether there was sufficient p that the calls had been made. The sixty-third sec provides that the orders and proceedings of every m ing (as well general as special) of the company shall entered into some book or books, to be provided kept for that purpose, and shall be signed by the ch man of such meeting, and such orders and proceedi when so entered and signed, and also the minutes entries hereinafter provided to be kept of the orders proceedings of the directors, when signed, as her after ordered, shall be deemed original orders and p ceedings, and shall be allowed to be read in evidenc

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all courts, and before all judges, justices, and others, and that without proof of such meeting having been duly convened, or of the persons making or entering such orders or proceedings being proprietors or directors of the company, as the case may be.

It seems to me that the object was, that, if the book was produced, all objection as to its being signed at a meeting duly convened, or being signed at all, should be excluded. In an action by a proprietor against the company, they could not have set up the irregularity; and it would be equally unjust in an action against a proprietor to allow him to avail himself of an irregularity, which he might have caused to be corrected, as an answer to an action for calls which he had undertaken to pay. I am not satisfied that the book was not kept with perfect propriety under the seventy-fifth section. It would, perhaps, have excluded all question, if the minutes had been signed at the same meeting at which the proceedings took place. But it is very easy to see that the entering of the minutes, and the signing of those minutes by the chairman during the meeting, would have been attended with great inconvenience. The seventy-fifth section requires that the minute and entry of the orders and proceedings, at every meeting of the directors, shall be signed by the chairman at each respective meeting. Chairman must mean the director presiding at each meeting; and it is not said at what time the signature shall be affixed.

ERSKINE J. At the trial of the action against *Richards*, two objections were taken before me. I retain the opinion which I expressed at the trial. Nothing which has been urged to-day has been sufficient to induce the court to come to a different conclusion. The first objection made was to the admissibility of the register-book, the second, as to the admissibility of the minute-

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book. No objection was raised as to the effect of either, supposing them to be admissible.

It was contended that the register-book produced was not an original book, and that an earlier book ought to have been produced. Instead of the entries being made from time to time, it was insisted that this book had evidently been made up at one time, and no doubt for the purpose of the action. It was said that the statute directed the entries to be made by the secretary, and that this direction had not been pursued. But the statute does not require that the entry should be made by the hand of the secretary. It is sufficient if they are made by the direction or under the personal inspection of the secretary. Then it was urged that the book was not kept in the manner required by the statute. The place of abode was omitted, and the number of the shares held, and the numbers by which the shares should have been distinguished. In *Arnett's* case it appeared that the registered numbers of his shares had been recently added: this raises the question whether it is necessary that the book should be perfect at the time the calls are made. The statute makes the book only evidence that the party is a proprietor: there is no entry of the time when he became proprietor. It might have been unreasonable, therefore, to enact that the book should be evidence that a party, named therein as holding a certain number of shares in the undertaking, was proprietor of those shares at a by-gone time when the calls were made. *Richards*, indeed, was a proprietor named in the act for some shares, and his name being entered in the book as a proprietor of forty shares, the jury would have little hesitation in coming to the conclusion that he had been the holder of that number of shares at the time the calls were made. Against *Arnett* there was the additional evidence of attendance at former meetings.

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tion. The statute speaks of directors and
irectors in the same sense. From the con-
ontended for on the part of the defendant, a
irectors consisting of three members, might
committee appointed by the directors at large

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be verified by the attestation of the person wh sided at the meeting.

The statute having given a form for declaring, not necessary to insert a count for interest. How he do that unless interest were recoverable?

Rules in each case disch

May 28.

FAULKNER *v.* WHITTALL.

In shewing cause against a rule *nisi* for judgment, as in case of a nonsuit, it is not necessary that the affidavit should state that plaintiff has a good cause of action.

Where a defendant had become insolvent after action brought, and refused to accept a *stet processus*, the court discharged a rule *nisi* for judgment as in case of a nonsuit, although plaintiff had given notice of trial after he had become apprised of the insolvency.

ISSUE was joined in *Michaelmas* term. In term,

Andrews Serjt. obtained a rule *nisi* for jud as in case of a nonsuit, the plaintiff having made in not trying the cause at the last *Warwick* a pursuant to notice.

Stephen Serjt. now shewed cause, upon an a stating that, shortly after the commencement action, the defendant left his residence in a state solvency, and had not since been heard of. The p is not bound to go on under such circumstances: willing to consent to the entering of a *stet pr* [*Tindal* C. J. You may be compelled to go to t proviso.]

Andrews Serjt., in support of his rule. The pla affidavit does not shew that he had any good ca action. He was aware of the defendant's inso long before he gave notice of trial. That step, fore, ought not to have been taken.

TINDAL C. J. It is not usual in affidavits pr on shewing cause against rules for judgment as i

of a nonsuit, to state that the plaintiff has a good cause of action. I think that the defendant must elect between accepting a *stet processus* or having his rule discharged, in which case the costs of the motion may be costs in the cause.

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Andrews Serjt. elected to have his Rule discharged.

DAVIES and Wife, Demandants; WILLIAM SELBY LOWNDES, Tenant.

June 9.

THIS was a writ of right brought to recover lands in *Buckinghamshire*, which the demandant, *Elizabeth Davies*, claimed as heir general to one *Thomas James Selby*, who died seised of such lands in *December* 1772. The *mise* was joined on the mere right. (*a*).

The cause was tried at the bar of this court in *Easter* term 1835, when a verdict was returned for the tenant, subject to certain exceptions taken on the part of the demandants to the ruling of the Court.

On the trial of a writ of right, in which the *mise* was joined on the mere right, the court left three matters of fact to the grand assise; first, whether the female demandant had made out her pedigree; secondly, whether at the time of the levying of a fine, the conusor had an estate of freehold in the premises on which the fine could operate; and, thirdly, whether he was then known by the name (*William Selby*) in which the fine was levied.

The grand assise found a general verdict for the tenant, and delivered in a written statement in the following terms: — "It is the unanimous verdict of the grand assise that the demandant has not made out her pedigree; that the conusor had entered into, and was in the actual possession of, the estates devised by the will of *T. J. Selby*, before and at the time of the levying of the fine in 1784; and that he had taken and used, and was then known by, the name of *William Selby*."

Held, that the written statement could not be introduced into a bill of exceptions, tendered on the part of the demandant to the ruling of the court on the foregoing questions of fact, — the statement being the opinion of the jury on points preliminary to their verdict, which points they were not called upon by law to find.

(*a*) See the pleadings at length, 1 *New Cases*, 597.; 2 *Scott*, 71.

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The exceptions were argued in the Exchequer chamber in *Easter* vacation, 1837, and in *Easter* vacation, 1838, the court of error delivered their judgment and awarded a *venire de novo* (*a*).

The cause was tried a second time at the bar of this Court in *Michaelmas* vacation, 1838 (*b*).

On the part of the tenant, a decree in Chancery, bearing date the 28th of *March* 1783, was offered in evidence in order to shew the nature of the tenant's possession of the property at that period, but was objected to by the demandants' counsel as inadmissible, being *res inter alios gesta*. The Court, however, overruled the objection, and the document was received.

The next evidence offered by the tenant was a fine levied by his father, *William Lowndes*, in *Trinity* term, 1784, in the name of *William Selby*, being the name he was required to assume by the will of *Thomas James Selby*, as the condition upon which he was to take the estates in the event of no heir at law of the testator being found (*c*). This evidence was also objected to on three grounds; first, that it should have been pleaded specially; secondly, that it was not levied in the name by which the conusor was known; and, thirdly, that he had no sufficient estate of freehold whereon the fine could operate, not being in possession of the lands in his own right, but merely as receiver of the court of Chancery. The fine was admitted.

After the case of the tenant was closed, the demandants, in order to establish the pedigree of *Elizabeth Davies*, produced a pedigree of a *Welsh* family of the name of *Lloyd*, which purported to have been "collected from parish registers, wills, monumental inscriptions, family

(*a*) See 4 *New Cases*, 478.; 5 *Scott*, 835.

(*b*) See 5 *New Cases*, 161.; 7 *Scott*, 21.

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records and history." The pedigree was objected to on the part of the tenant, and was rejected.

The Lord Chief Justice left three matters of fact for the determination of the grand assise; first, whether they were satisfied that the demandant, *Elizabeth Davies* had made out her pedigree; secondly, whether at the time that the fine was levied, the tenant's father had an estate of freehold in the premises on which the fine could operate; and, thirdly, whether he was then known by the name in which the fine was levied.

When the summing up was concluded, a note of exceptions was tendered on the part of the demandants, which exceptions in substance were:

First, that the decree in Chancery of the 28th of *March* 1783 was improperly received in evidence, being *res inter alios gesta*. Secondly, that the *Welsh* pedigree was improperly rejected. Thirdly, that the fine levied by *William Lowndes* (in the name of *William Selby*), was of no effect, because at the time of levying it he had no sufficient estate in the premises in respect of which the fine was levied; for that, as he claimed through the will of *Thomas James Selby*, the testator, his possession of the premises could not be a disseisin of, or adverse to, the claim of any person claiming through the testator, or claiming under the will of the testator, and that his possession must be referred to the terms of the will.

The grand assise, on their return into court, delivered in a written paper in the following terms: — "It is the unanimous verdict of the grand assise, that the demandant has not made out her pedigree; that the tenant (*a*) had entered into, and was in the actual possession of, the estates devised by the will of *Thomas James Selby* before and at the levying of the fine in 1784;

(*a*) The tenant's father was meant.

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and that he had taken and used, and was then known by the name of *William Selby*." On being asked by the Lord Chief Justice whether they found for the tenant, the foreman replied in the affirmative, and thereupon a general verdict was entered for the tenant.

Sir *John Campbell* A. G., on behalf of the tenant, in *Easter* term last obtained a rule, calling upon the demandants to shew cause why the bill of exceptions should not record or shew the finding of the grand assise upon the several questions left to them by the court. (*a*)

May 29. *Talfourd* Serjt., and *E. V. Williams*, on a former day in this term, shewed cause. There are two grounds on which it is submitted that the special finding of the grand assise cannot be introduced into the bill of exceptions. First, it is clear that in a writ of right, the jury cannot return a special verdict, but only a general recognition. This is distinctly laid down by the authorities. In the third resolution in *Andrews* v. *Lord Cromwell* (*b*) it was ruled, "*Le jury ne poit trover un special verdict.*" *Viner's Abridgment, Droit de Recto* (D.) pl. 13. *Brooke's Abridgment, Verdite*, pl. 86. (*c*) *Roscoe on Real Actions*, p. 300. In *Spiers* v. *Morris* (*d*) a special verdict was found in the case of a writ of right, but there it was with the consent of both parties, and it was understood that otherwise it could not be done. The statute of *Westminster* 2. (13 *Edw.* 1.) *c.* 30. *s.* 2., under which special verdicts originated, does not extend to writs of right. That statute provides, that "the justices

(*a*) *Bosanquet* J. was previously applied to at chambers, but, after consulting the other judges, he refused the application.

(*b*) Sir *F. Moore*, 762.

(*c*) The passage cited from *Brooke* only relates to writs of assise.

(*d*) 9 *Bingh.* 687.; 3 *Bing. N. C. & Scott*, 126.

of assize shall not compel the jurors to say precisely whether it be *disseisin* or not, so as they state the truth of the fact, and pray the aid of the justices; but if they will say of their own accord that it is *disseisin*, their verdict shall be admitted at their own peril." [*Tindal* C. J. The statute is confined to justices of assise; we are sitting here as a court.] No attaint lay on a writ of right. Here, the Lord Chief Justice did not tell the grand assize to find the points put to them, but merely submitted the points as matters for their guidance in considering of their verdict. The only question for them to decide was, which party was entitled to hold the lands; and the writ of error will remove a transcript of the record on which it will appear that a general verdict was found for the tenant.

Secondly, even if the jury had a right to return a special finding, such finding cannot appear on the bill of exceptions. Formerly the practice under the statute of *Westminster* 2. (13 *Edw.* 1. *c.* 31.) was to seal the bill of exceptions as soon as the exceptions were taken. Now, for the sake of convenience, the bill of exceptions is not prepared until afterwards, but it is still presumed to be perfected at the trial, and is stated on the record to have been sealed at the time. In strictness, therefore, the verdict can never appear on the bill of exceptions: and even now that the ancient practice is departed from, it is not necessary, although usual, that the verdict should be stated in the bill of exceptions; for the latter may be tacked to the judgment-roll, which contains the history of the cause down to the verdict, and the judgment of the court below. Properly speaking, all that should be introduced into the bill of exceptions, are the exceptions to the ruling of the judge, together with so much of the evidence as is requisite to render the exceptions intelligible to the court of error, so as to shew sufficient grounds for allowing or disallowing such exceptions. On the whole, it is submitted that it is

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unnecessary to consider whether the grand assize could find a special verdict, for it cannot be contended that what they said amounted to a special verdict. This is an attempt to introduce into the bill of exceptions a communication made to the court by the grand assize, which they had no right to make, and the Court had no authority to receive, and which, even if it were inserted, could not have any legal effect in qualifying or explaining the general verdict found for the tenant.

Sir *John Campbell* A. G., *Wilde* S. G., *Kelly*, and *Gray*, in support of the rule. Nothing is sought to be introduced into the bill of exceptions but what is consistent with the ends of justice. Upon the first trial of this cause, three grounds of defence were set up by the tenant; first, that the demandant, *Elizabeth Davies*, did not answer the description of the party contemplated in the will; secondly, that she had not succeeded in making out her pedigree; and, thirdly, that the fine levied with proclamations in *Trinity* term, 1784, had, at all events, barred her claim (*a*). The first was a question of law: the others were left to the grand assise, who found their verdict for the tenant, but did not state on which point their finding was grounded. The court of error, dissenting from the opinions of Lords *Mansfield* and *Loughborough* (*b*), held, that the ruling of this Court with regard to the construction of the will, was erroneous, and they awarded a *venire de novo*, because they could not be certain that the grand assise, in finding their verdict, had not acted upon the erroneous direction given with respect to the will (*c*). At the second trial this Court felt itself bound by the opinion of the

(*a*) *Vide* 1 *N.* & *M.* 133. 166. n. 73.

(*b*) See 1 *New Cases*, 620. 622.; 2 *Scott*, 79, 80. n.

(*c*) *Vide Doe d. Lord Teynham* v. *Tyler*, 6 *Bingh.* 561., overruled in *Baron de Rützen* v. *Farr*, 4 *Ad.* & *El.* 53.; 5 *N.* & *M.* 617.

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f error as to the construction of the will; but the ier points were again set up as separate and dis- fences by the tenant, and with reference to them estions were submitted to the grand assise; first, r the female demandant had established her e; and, secondly, whether the fine was so levied ir her claim. The grand assise answered the two ns by stating that they were unanimously of , that the demandant had not made out her pe- that the tenant (meaning the tenant's father) tered into and was in the actual possession of the devised by the will of *Thomas James Selby* before the time of levying the fine in 1784, and that he en and used, and was then known by the name *iam Selby*. Has not the tenant a right to have wers given by the grand assise to the two points them, inserted in the bill of exceptions, in order e court of error may know that the question of missibility of the *Welsh* pedigree became imma- fter the finding of the grand assise with respect fine? The grand assise might not be bound to o any finding upon the points submitted to [*Tindal* C. J. At the first trial the jury were o answer the questions put to them, which they d to do, not being all agreed with respect to one questions. Upon the second trial I abstained sking them to give me answers to the points I stated for their consideration.] But having answers, and the points being incident to the and such as they were bound to consider before turned their verdict, the finding they came to arly within their province, and it ought now to rted in the bill of exceptions along with the ver- order to explain the latter. [*Tindal* C. J. Is my legal mode of separating what was passing in nds of the jury with respect to the pedigree and

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the fine, when they came to the determination of retu ing their verdict for the tenant? *Maule* J. They mi be unanimous in finding for the tenant, but half of th might be so upon one point, and the rest upon the othe

The verdict always appears upon the bill of exceptio as is shewn by all the books of entries and of practi Unless the verdict be inserted in the bill of exceptions, will not shew that the party is aggrieved. [*Maule*. The statute of *Westminster* 2 (13 *Ed.* 1.) c. 31., say that "judgment shall be given according to the exce tion, as it may be allowed or disallowed;" but accor ing to your argument the court of error cannot proce to give judgment without knowing which way the ve dict went.] It should appear that the party complaini is aggrieved, and for that purpose the bill of exceptio must contain a narrative of what took place at the tri It is argued on the other side that the bill of exce tions ought not to contain any thing which occurr subsequently to its being tendered; but there is nothi in the statute requiring that the bill of exceptions shou be sealed during the trial, although the exceptio must be then taken. Lord *Coke*, in his remarks on t statute says, 2 *Institute*, 427., "Though no time l appointed by this act when the justices shall put the seals, the party must pray the same before judgmen but if they deny it, then may they be commanded, aft judgment, to put their seals, and then the putting their seals after judgment shall be sufficient." It is no contended that the finding of the grand assise amounte to a special verdict, although there are authorities tha a special verdict may be given in a writ of right; *Co Litt.* 226 *b.*, 227 *b.* (*a*), *Dowman's Case.* (*b*) It is said tha

(*a*) In *Co. Litt.* 227. *a.* it is said, "So may the jurie find a warrantie being given in evidence, though it be not pleaded, because it bindeth the right, *unlesse it be in a writ of right when the mise is joined upon the meere right.*"

(*b*) 9 *Rep.* 14. *a.*

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the special finding of the grand assize, even if it were inserted in the bill of exceptions, could not be admitted to explain the general verdict found for the tenant; if so, it will merely be nugatory, and the court of error may reject it; but if such special finding has any legal operation, the tenant ought to have the benefit of it.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This is an application made on the part of the tenant in a writ of right, for leave to insert in the bill of exceptions, which was tendered to the judges of the court before whom the trial at bar took place, a communication or special finding made by the recognitors in writing, and presented to the court at the same time when they brought in their verdict for the tenant.

The mise in this case was joined upon the mere right, and the tenant put himself upon the grand assise; and, from the course of the evidence at the trial, the recognitors of the assise were informed by the court, upon summing up the evidence, that there were three certain matters of fact which were then pointed out to them, upon which it was necessary they should come to a determination in order to decide whether their verdict should be for the demandant or for the tenant.

The grand assise, upon returning into court, delivered in a written paper in the following terms; viz., "It is the unanimous verdict of the grand assise, that the demandant has not made out her pedigree; that the tenant had entered into, and was in the actual occupation of the estates devised by the will of *Thomas James Selby*, before and at the time of levying the fine of 1784; and that he had taken and used, and was then known by the name of *William Selby*." And at the same time they stated that they found their verdict for the tenant.

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The SOUTHAMPTON Dock Company v. RICHARDS.

be verified by the attestation of the person wh sided at the meeting.

The statute having given a form for declaring, not necessary to insert a count for interest. How he do that unless interest were recoverable?

Rules in each case disch

May 28.

FAULKNER *v.* WHITTALL.

In shewing cause against a rule *nisi* for judgment, as in case of a nonsuit, it is not necessary that the affidavit should state that plaintiff has a good cause of action.

Where a defendant had become insolvent after action brought, and refused to accept a *stet processus*, the court discharged a rule *nisi* for judgment as in case of a nonsuit, although plaintiff had given notice of trial after he had become apprised of the insolvency.

ISSUE was joined in *Michaelmas* term. In . term,

Andrews Serjt. obtained a rule *nisi* for jud as in case of a nonsuit, the plaintiff having made in not trying the cause at the last *Warwick* a pursuant to notice.

Stephen Serjt. now shewed cause, upon an af stating that, shortly after the commencement action, the defendant left his residence in a state solvency, and had not since been heard of. The p is not bound to go on under such circumstances: willing to consent to the entering of a *stet pr* [*Tindal* C. J. You may be compelled to go to tr proviso.]

Andrews Serjt., in support of his rule. The pla affidavit does not shew that he had any good ca action. He was aware of the defendant's inso long before he gave notice of trial. That step, fore, ought not to have been taken.

TINDAL C. J. It is not usual in affidavits pr on shewing cause against rules for judgment as i

of a nonsuit, to state that the plaintiff has a good cause of action. I think that the defendant must elect between accepting a *stet processus* or having his rule discharged, in which case the costs of the motion may be costs in the cause.

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Andrews Serjt. elected to have his Rule discharged.

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June 9.

On the trial of a writ of right, in which the *mise* was joined on the mere right, the court left three matters of fact to the grand assise; first, whether the female

THIS was a writ of right brought to recover lands in *Buckinghamshire*, which the demandant, *Elizabeth Davies*, claimed as heir general to one *Thomas James Selby*, who died seised of such lands in *December* 1772. The *mise* was joined on the mere right. (*a*).

The cause was tried at the bar of this court in *Easter* term 1835, when a verdict was returned for the tenant, subject to certain exceptions taken on the part of the demandants to the ruling of the Court.

demandant had made out her pedigree; secondly, whether at the time of the levying of a fine, the conusor had an estate of freehold in the premises on which the fine could operate; and, thirdly, whether he was then known by the name (*William Selby*) in which the fine was levied.

The grand assise found a general verdict for the tenant, and delivered in a written statement in the following terms: — "It is the unanimous verdict of the grand assise that the demandant has not made out her pedigree; that the conusor had entered into, and was in the actual possession of, the estates devised by the will of *T. J. Selby*, before and at the time of the levying of the fine in 1784; and that he had taken and used, and was then known by, the name of *William Selby*."

Held, that the written statement could not be introduced into a bill of exceptions, tendered on the part of the demandant to the ruling of the court on the foregoing questions of fact, — the statement being the opinion of the jury on points preliminary to their verdict, which points they were not called upon by law to find.

(*a*) See the pleadings at length, 1 *New Cases*, 597.; 2 *Scott*, 71.

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The exceptions were argued in the Exchequer cha ber in *Easter* vacation, 1837, and in *Easter* vacati 1838, the court of error delivered their judgment a awarded a *venire de novo* (*a*).

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On the part of the tenant, a decree in Chance bearing date the 28th of *March* 1783, was offered in e dence in order to shew the nature of the tenant's poss sion of the property at that period, but was objected by the demandants' counsel as inadmissible, being *inter alios gesta.* The Court, however, overruled objection, and the document was received.

The next evidence offered by the tenant was a f levied by his father, *William Lowndes*, in *Trinity* ter 1784, in the name of *William Selby*, being the name was required to assume by the will of *Thomas Jan Selby*, as the condition upon which he was to take t estates in the event of no heir at law of the testat being found (*c*). This evidence was also objected to three grounds; first, that it should have been plead specially; secondly, that it was not levied in the na by which the conusor was known; and, thirdly, that had no sufficient estate of freehold whereon the fi could operate, not being in possession of the lands his own right, but merely as receiver of the court Chancery. The fine was admitted.

After the case of the tenant was closed, the demar ants, in order to establish the pedigree of *Elizabeth L vies*, produced a pedigree of a *Welsh* family of the na of *Lloyd*, which purported to have been "collected fr parish registers, wills, monumental inscriptions, fam

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The Lord Chief Justice left three matters of fact for the determination of the grand assise; first, whether they were satisfied that the demandant, *Elizabeth Davies* had made out her pedigree; secondly, whether at the time that the fine was levied, the tenant's father had an estate of freehold in the premises on which the fine could operate; and, thirdly, whether he was then known by the name in which the fine was levied.

When the summing up was concluded, a note of exceptions was tendered on the part of the demandants, which exceptions in substance were:

First, that the decree in Chancery of the 28th of *March* 1783 was improperly received in evidence, being *res inter alios gesta*. Secondly, that the *Welsh* pedigree was improperly rejected. Thirdly, that the fine levied by *William Lowndes* (in the name of *William Selby*), was of no effect, because at the time of levying it he had no sufficient estate in the premises in respect of which the fine was levied; for that, as he claimed through the will of *Thomas James Selby*, the testator, his possession of the premises could not be a disseisin of, or adverse to, the claim of any person claiming through the testator, or claiming under the will of the testator, and that his possession must be referred to the terms of the will.

The grand assise, on their return into court, delivered in a written paper in the following terms: — "It is the unanimous verdict of the grand assise, that the demandant has not made out her pedigree; that the tenant(*a*) had entered into, and was in the actual possession of, the estates devised by the will of *Thomas James Selby* before and at the levying of the fine in 1784;

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Secondly, even if the jury had a right to return a special finding, such finding cannot appear on the bill of exceptions. Formerly the practice under the statute of *Westminster* 2. (13 *Edw.* 1. *c.* 31.) was to seal the bill of exceptions as soon as the exceptions were taken. Now, for the sake of convenience, the bill of exceptions is not prepared until afterwards, but it is still presumed to be perfected at the trial, and is stated on the record to have been sealed at the time. In strictness, therefore, the verdict can never appear on the bill of exceptions: and even now that the ancient practice is departed from, it is not necessary, although usual, that the verdict should be stated in the bill of exceptions; for the latter may be tacked to the judgment-roll, which contains the history of the cause down to the verdict, and the judgment of the court below. Properly speaking, all that should be introduced into the bill of exceptions, are the exceptions to the ruling of the judge, together with so much of the evidence as is requisite to render the exceptions intelligible to the court of error, so as to shew sufficient grounds for allowing or disallowing such exceptions. On the whole, it is submitted that it is

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Sir *John Campbell* A. G., *Wilde* S. G., *Kelly*, an[illegible] *Gray*, in support of the rule. Nothing is sought t[illegible] be introduced into the bill of exceptions but what is consistent with the ends of justice. Upon the first trial of this cause, three grounds of defence were set up by the tenant; first, that the demandant, *Elizabeth Davies*, did not answer the description of the party contemplated in the will; secondly, that she had not succeeded in making out her pedigree; and, thirdly, that the fine levied with proclamations in *Trinity* term, 1784, had, at all events, barred her claim (*a*). The first was a question of law: the others were left to the grand assise, who found their verdict for the tenant, but did not state on which point their finding was grounded. The court of error, dissenting from the opinions of Lords *Mansfield* and *Loughborough* (*b*), held, that the ruling of this Court with regard to the construction of the will, was erroneous, and they awarded a *venire de novo*, because they could not be certain that the grand assise, in finding their verdict, had not acted upon the erroneous direction given with respect to the will (*c*). At the second trial this Court felt itself bound by the opinion of the

(*a*) *Vide* 1 *N.* & *M.* 133. 166. n. 73.

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court of error as to the construction of the will; but the two other points were again set up as separate and distinct defences by the tenant, and with reference to them two questions were submitted to the grand assise; first, whether the female demandant had established her pedigree; and, secondly, whether the fine was so levied as to bar her claim. The grand assise answered the two questions by stating that they were unanimously of opinion, that the demandant had not made out her pedigree; that the tenant (meaning the tenant's father) had entered into and was in the actual possession of the estates devised by the will of *Thomas James Selby* before and at the time of levying the fine in 1784, and that he had taken and used, and was then known by the name of *William Selby*. Has not the tenant a right to have the answers given by the grand assise to the two points put to them, inserted in the bill of exceptions, in order that the court of error may know that the question of the admissibility of the *Welsh* pedigree became immaterial, after the finding of the grand assise with respect to the fine? The grand assise might not be bound to come to any finding upon the points submitted to them. [*Tindal* C. J. At the first trial the jury were asked to answer the questions put to them, which they declined to do, not being all agreed with respect to one of the questions. Upon the second trial I abstained from asking them to give me answers to the points which I stated for their consideration.] But having given answers, and the points being incident to the cause, and such as they were bound to consider before they returned their verdict, the finding they came to was clearly within their province, and it ought now to be inserted in the bill of exceptions along with the verdict, in order to explain the latter. [*Tindal* C. J. Is there any legal mode of separating what was passing in the minds of the jury with respect to the pedigree and

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the fine, when they came to the determination of retu ing their verdict for the tenant? *Maule* J. They mi be unanimous in finding for the tenant, but half of th might be so upon one point, and the rest upon the oth

The verdict always appears upon the bill of exceptic as is shewn by all the books of entries and of pract Unless the verdict be inserted in the bill of exception will not shew that the party is aggrieved. [*Maul* The statute of *Westminster* 2 (13 *Ed.* 1.) c. 31., s that "judgment shall be given according to the exc tion, as it may be allowed or disallowed;" but acco ing to your argument the court of error cannot proc to give judgment without knowing which way the dict went.] It should appear that the party complain is aggrieved, and for that purpose the bill of excepti must contain a narrative of what took place at the tr It is argued on the other side that the bill of exc tions ought not to contain any thing which occur subsequently to its being tendered; but there is noth in the statute requiring that the bill of exceptions sho be sealed during the trial, although the excepti must be then taken. Lord *Coke*, in his remarks on statute says, 2 *Institute*, 427., "Though no time appointed by this act when the justices shall put th seals, the party must pray the same before judgme but if they deny it, then may they be commanded, a judgment, to put their seals, and then the putting their seals after judgment shall be sufficient." It is contended that the finding of the grand assise amoun to a special verdict, although there are authorities t a special verdict may be given in a writ of right; *Litt.* 226 *b.*, 227 *b.* (*a*), *Dowman's Case.* (*b*) It is said t

(*a*) In *Co. Litt.* 227. *a.* it is said, "So may the jurie find a warrantie being given in evidence, though it be not pleaded, because it bindeth the right, *unlesse it be in a writ of ri when the mise is joined the meere right.*"

(*b*) 9 *Rep.* 14. *a.*

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the special finding of the grand assize, even if it were inserted in the bill of exceptions, could not be admitted to explain the general verdict found for the tenant; if so, it will merely be nugatory, and the court of error may reject it; but if such special finding has any legal operation, the tenant ought to have the benefit of it.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This is an application made on the part of the tenant in a writ of right, for leave to insert in the bill of exceptions, which was tendered to the judges of the court before whom the trial at bar took place, a communication or special finding made by the recognitors in writing, and presented to the court at the same time when they brought in their verdict for the tenant.

The mise in this case was joined upon the mere right, and the tenant put himself upon the grand assise; and, from the course of the evidence at the trial, the recognitors of the assise were informed by the court, upon summing up the evidence, that there were three certain matters of fact which were then pointed out to them, upon which it was necessary they should come to a determination in order to decide whether their verdict should be for the demandant or for the tenant.

The grand assise, upon returning into court, delivered in a written paper in the following terms; viz., "It is the unanimous verdict of the grand assise, that the demandant has not made out her pedigree; that the tenant had entered into, and was in the actual occupation of the estates devised by the will of *Thomas James Selby*, before and at the time of levying the fine of 1784; and that he had taken and used, and was then known by the name of *William Selby*." And at the same time they stated that they found their verdict for the tenant.

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Now it has been very properly admitted sides, upon the discussion of this motion, that munication or finding of the recognitors v special verdict. Indeed, it bears no analogy special verdict is, when the jury find the spec and thereupon pray the discretion of the (*Litt.* 226. *b.*); whereas this finding contains no of facts whatever. Neither is it a general ve that is where the jury find the point in issue as in *assise*, *nul tort*, or *nul disseisin*; that *disseisivit* or *non disseisivit* (*Co. Litt. ib.*); wl is only a statement of the opinion or finding o on some points preliminary to their verdict, which such verdict is to be founded, but, in of the word, the verdict itself, which verdict the province of the jury to find.

The ground upon which the tenant insists finding of the jury ought to be inserted in t exceptions, is, that the bill of exceptions shou a history of the proceedings at the trial of v finding forms part; and without which, it is (the verdict of the jury is not intelligible. answer made in the course of the argument s us to be satisfactory and conclusive, that th object of the bill of exceptions is, to contain t tion made to the directions and ruling of th together with so much of the evidence given a as is necessary to make the exception intelligil court of error, and furnish grounds for the (or disallowance of the exception. And furth is unnecessary that the bill of exceptions shoul the statement of the verdict within it, alt more commonly does so; for the bill of excep be appended to the judgment roll, which co pleadings, the issues joined, the jury process, dict, and the judgment of the court below.

Upon legal reasoning, therefore, there c

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stronger ground for insisting that this communication of the jury to the court should be set out upon the bill of exceptions, than that it should be set out in the *postea*, immediately preceding the verdict.

Although this application arises upon a writ of right, and a bill of exceptions has been tendered, we must be prepared to say, if the present application is to be granted, that in every civil action where the verdict of the jury depends, as it very often must, on the view which they take of several distinct points occurring upon the evidence, if the jury think proper to express to the court their finding of those distinct points, as well as their verdict, such findings or determinations of the jury must be inserted in the *postea* as well as the verdict itself; a course of proceeding for which no authority has been produced, and which has never obtained in practice. The same would be the necessary course to be pursued in criminal proceedings also; and to what inconvenience such a deviation from the regular established course would give rise, will readily suggest itself, when it is considered that it is to the verdict of the jury alone that the law gives absolute credit, being the finding of the jury on the precise issue which they are sworn to find, and not to any collateral findings of the jury which they may make amongst themselves as steps in the way of arriving at such verdict.

It would, undoubtedly, be much more convenient for the tenant to have separate findings on all those points, the finding of which, combined together, constitute the verdict which the recognitors brought in, that the tenant has the more mere right to hold the land in dispute. But it must not be forgotten that the inconvenience has arisen from the form of the plea; for the tenant, if he had thought proper, instead of putting the mise on the mere right, might have traversed the descent alleged in the count, and also pleaded the fine with proclamations

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and non-claim, as a bar; and thus have procured the verdict of a jury of twelve men on each separate point.

For these reasons, therefore, we think that we are not authorised to allow an insertion upon the record of a statement by the jury which they were not called upon by law to find, and which, consequently, it was not within their province to make to the court.

Rule discharged.

June 15.

BROWNLOW *v.* TOMLINSON, WALKER, and CLAYTON.

In 1838, the occupier of a field called the *Hall Close*, took down the old fence and added to the field a strip of land adjoining a public road.

In an action for a trespass committed upon the strip of land about a year after it had been so taken in, the declaration described the *locus in quo* as the *Hall Close*: Held, that it was properly described.

TRESPASS for breaking and entering a certain close of the plaintiff called the *Hall Close*, situate in the parish of *Beckingham*, in the county of *Nottingham*.

Pleas, first, not guilty; secondly, that the said close was not the close of the plaintiff; thirdly, that it was the close, soil, and freehold of the Queen; fourthly, that it was the close, soil, and freehold of the Archbishop of *York*; fifthly, that it was the close, soil, and freehold of the defendants *Walker* and *Clayton*, the surveyors of the highways in the said parish of *Beckingham*; sixthly, that it was the close, soil, and freehold of certain parties being the churchwardens and overseers of the poor of the said parish of *Beckingham*. The seventh plea set out an inclosure act passed in *November* 1774, whereby it was enacted (among other things) that the soil, and also the herbage and profits of public roads repaired at the public expense, should be vested in the surveyors of the highways of *Becking-*

There may be both an occupation way and a public highway over the same road, for it does not, on becoming a highway, cease to be an occupation way. Per Lord *Denman* C. J., at *Nisi Prius*.

lam for the time being, and should be applied in repairing the highways within the said parish. And after averring an immemorial right of way for the inhabitants of and occupiers of lands in the said parish over the *locus in quo*, and that such way was a road repaired at the public expense within the intent and meaning of the said inclosure act, it alleged that the defendants *Walker* and *Clayton*, as surveyors of the highways of *Beckingham* aforesaid, were entitled, by virtue of the said act, to the herbage and profits of the said way. The eighth plea set up a public highway, and the ninth plea an occupation road for the inhabitants of, and occupiers of land in, the said parish, over the *locus in quo*.

The plaintiff joined issue on the first and second pleas; to the third, fourth, fifth, and sixth he replied, that the close in which &c. was his soil and freehold; and transversed the several rights of way alleged in the seventh, eighth, and ninth pleas. He also, as to the three last-mentioned pleas, new assigned excess and extra viam; to which the defendants pleaded not guilty.

At the trial before Lord *Denman* C. J. at the last assizes for the county of *Nottingham*, it appeared that the plaintiff was the occupier of a field called the *Hall Close*, which adjoined a lane called the *Low* or *Cow Lane*. Previously to 1774, the road, after leaving the old inclosures, proceeded, over uninclosed lands, to the river *Trent*. Under an inclosure act passed in that year, the commissioners provided for the continuance of the road to the river, by setting out a private road from the bottom of the *Low Lane*, eastward, over the common to the *Trent*, for the use and benefit of the inhabitants of, and occupiers of grounds within, the parish of *Beckingham*, which was directed to be called the *Trent* road, and to be repaired in the same manner as the public highways within the said parish. The evidence shewed that the whole line of road, in addition to its being an occupa-

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tion way, had been used as a public road leading to a towing path along the *Trent*. The surveyors of the highways were proved to have exercised acts of ownership over the strips of land at the side of *Low* or *Cow Lane*, being that portion of the road which ran through the old inclosures. They had let the eatage of the lane annually at *Easter*, and a few years ago had permitted some poor persons to inclose several of these strips for gardens, in respect of which they had paid yearly a small acknowledgment. In 1838, the plaintiff removed the old fence of the *Hall Close*, and added three of the gardens to that field.

In *May* 1839, the defendants went with a number of labourers, armed with hatchets, and cut to pieces the posts and rails which had been put up by the plaintiff.

It was contended on the part of the defendants, that the *locus in quo* was improperly described in the declaration as "the *Hall Close*," the evidence having proved that previously to its being thrown into that field by the plaintiff, it had been known only by the name of "*Low* or *Cow Lane*."

The Lord Chief Justice thought that the close was properly described as the *Hall Close;* and after giving it as his opinion that there might be both a public highway and an occupation way over the road in question, and that it did not on becoming a highway cease to be an occupation way; left it to the jury to say, whether any of the justification pleaded by the defendants had been made out; and also with respect to the new assignment, whether the defendants, by cutting the posts and rails instead of removing them, as they might have done, had not, in asserting their right, been guilty of an excess.

The jury returned a verdict for the defendants on the seventh, eighth, and ninth issues; and for the plaintiff upon the other issues. They also found for him on the new assignment, damages 10*l.*

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Goulburn Serjt., in last *Easter* term, in pursuance of leave reserved to him at the trial, obtained a rule to shew cause why the verdict should not be entered for the defendants upon all the issues, on the ground of the alleged variance in the name of the close. No application was made to the Court on the ground that Lord *Denman* had directed the jury that there might be both a public highway and an occupation way over the *locus in quo* existing at the same time. (*a*)

Adams Serjt. and *Humfrey*, now shewed cause against the rule obtained by the defendants. It is submitted that there was no variance in the description of the close. By whatsoever name it may previously have been called, as soon as the *locus in quo* was added to to the *Hall Close* it became a portion of that field, and could not be properly designated by any other name. At any rate there was sufficient evidence to go to the jury, who by their verdict have in effect found that it was known by the name of the *Hall Close*. Should the court be of opinion that the *locus in quo* was not part of the *Hall Close*, the consequence would be, that there would not be the right of way over the *Hall Close* which the defendants set up, and, therefore, the plaintiff would be entitled to a verdict upon the issues found for the defendants.

Goulburn Serjt. and *Whitehurst*, in support of the rule. It was necessary for the plaintiff, under his declaration to prove that the trespass complained of was committed in the *Hall Close*, but, on the contrary, his own witnesses proved that it had always, up to the time of its being thrown into the *Hall Close*, been

(*a*) See *antè*, p. 401. The rights of the party entitled to the private way cannot be affected by the act of the owner of the soil in dedicating it to the public.

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known by the name of the *Cow Lane*. The is, whether the plaintiff can, by simply adding of land to his own field, give it the same name no answer to say that the defendants have c right of way in the *locus in quo* described as *Close*, and that they cannot, if the variance be retain their verdict on the seventh, eighth, a pleas, for each issue must stand by itself; it i jury to find the questions of fact raised by th the effect of their finding is for the court.

TINDAL C. J. The question for our conside whether the verdict found for the plaintiff on neral issue and on the new assignment ought t or whether it ought not to be entered for the de The ground on which the defendants contend verdict should be entered for them, is that th *quo* where the alleged trespass was committed is described. In the declaration, the place in qu called "the *Hall Close*," and the evidence at was, that it was a piece of land which originall part of a lane known by the name of *Cow La* that the plaintiff about two years ago added *Hall Close*. It was insisted that this was a var the *locus in quo* had never been known by the that close. It is difficult to say at what precis of time a slip of land added to a field will acc same name. Supposing, however, the plaintiff scribed the *locus in quo* as *Cow Lane*, would no fendants have said that by his own act in laying *Hall Close*, he had given it another name? If a really existed as to the name of the spot in qu should have been left to the jury. I know of n law requiring that a piece of land added to a fiel be called by a different name, from that of whi pears to form part, and in the present case t

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been time sufficient for the place in question to acquire the name of the close to which it was laid.

We cannot but observe that the whole of this difficulty has arisen from the defendants having used more violence than was necessary in the assertion of the right of way, and denying the excess when it was newly assigned by the plaintiff.

COLTMAN J. I think there was evidence from which the jury, if the point had been submitted to them, might have concluded that the small piece of land in question was known by the name of the *Hall Close*. The defendants do not appear to have been misled, and it seems to me that the justice of the case is with the verdict as it now stands.

ERSKINE J. The presumption is that the small piece of ground in question had acquired the same name as the rest of the close. If there was any doubt upon the point, it should have been put to the jury.

MAULE J. That the *locus in quo* is properly described as the *Hall Close*, is a matter of fact about which no reasonable man can have any doubt.

Rule discharged.

June 17.

DOE dem. TANSLEY and Others *v.* ROE.

Where a rule nisi for judgment in ejectment against the casual ejector is served on persons who appear and shew that they are not in possession and have no claim to the premises, they are entitled to the costs of being brought before the court.

BOMPAS Serjt., in the course of the present term, had obtained a rule calling upon six several persons to shew cause why the lessors of the plaintiff should not be at liberty to enter up the usual judgment in ejectment against the casual ejector.

Andrews and *Talfourd* Serjts., appeared on behalf of two of the parties who had been served with the rule; and, after stating that neither of them were in possession, nor had any claim to the premises sought to be recovered, asked for their costs in being unnecessarily brought before the court by the service of the rule.

Bompas Serjt. These parties were served with the rule in consequence of a servant naming them and others as being interested in the premises. The question is, can persons who disclaim having any interest in the property come before the court, merely to ask for costs? It is quite clear they need not have appeared.

TINDAL C. J. Your rule must at all events be made absolute. The only question is, whether the parties appearing are not entitled to their costs. Some costs, although of small amount, must necessarily have been incurred by them in consequence of their being served with the rule nisi; and they have a right, if they think proper, to come to the court to ask for such costs. The rule must therefore be absolute on payment to these parties of their costs.

Rule absolute accordingly.

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June 17.

TRESPASS for seizing and distraining the plaintiff's goods. Plea, not guilty.

By the Reform Act (2 *W.* 4. *c.* 45. *s.* 3. schedule C.), it was enacted, that *Stockport* should for the purposes of that act be a borough, and by the Boundaries Act (2 & 3 *W.* 4. *c.* 64. *s.* 35. schedule O.), it was declared that the borough of *Stockport* should comprise among other places the township of *Stockport* and the hamlets of *Brinksway* and *Edgeley*, the latter hamlet being part of the township of *Cheadle Buckley*.

By the Municipal Corporation Act (5 & 6 *W.* 4. *c.* 76. *s.* 7.), it is enacted that after the passing of that act the metes and bounds of the several boroughs named in the first section of the schedules annexed to the act, (of which *Stockport* was one) for the purposes of the act, shall be the same as the limits thereof respectively settled and described in the 2 & 3 *W.* 4. *c.* 64.

And by sect. 92., providing for the making of a rate in aid of the borough fund, it is among other things

By the Municipal Corporation Act, 5 & 6 *W.* 4. *c.* 76., councils of boroughs were authorised to order borough rates to be made within their boroughs, and for that purpose were to have all the powers which county justices had by virtue of the 55 *G.* 3. *c.* 51. for the levying of county rates.

The council of the borough of *S.* ordered a

borough rate to be made, and assessed upon the township of *C.*, in respect of a portion of it, namely, the hamlet of *E.*, which was within the borough, a certain sum.

The plaintiff, as overseer of the township, was called upon to pay the assessment, and having failed to do so, the defendant, as mayor of the borough, issued a warrant, under which the plaintiff's goods were seized.

The plaintiff having brought an action of trespass against the defendant for the seizure of his goods: Held, that the council of the borough had no authority to make the assessment in question, and that inasmuch as the defendant had no jurisdiction to issue the warrant, trespass was the proper remedy.

To prove the warrant, the high constable of the borough, who had been served with a *subpœna duces tecum*, was called. He stated that he had deposited the warrant in his office, that he had searched for it but could not find it, that he did not know what had become of it, and that the town clerk had access to his office. Held, that secondary evidence might be given of the contents of the warrant.

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enacted, that "in case the borough fund shall not be sufficient for the purposes aforesaid, the council of the borough is hereby authorized and required from time to time to estimate, as correctly as may be, what amount in addition to such fund will be sufficient for the payment of the expences to be incurred in carrying into effect the provisions of this act; and, in order to raise the amount so estimated, the said council is hereby authorised and required, from time to time, to order a borough rate in the nature of a county rate, to be made within their borough, and for that purpose the council of such borough shall have within their borough all the powers which any justices of the peace, assembled at their general or quarter sessions in any county in *England*, have within the limits of their commission, by virtue of an act made in the fifty-fifth year of his late majesty King *George* the Third, intituled 'An act to amend an act of his late majesty King *George* the Second, for the more easy assessing, collecting, and levying of county rates,' or *as near thereto as the nature of the case will admit*, except as is hereinafter excepted; and all warrants required by the said act to be issued under the hands and seals of two or more justices shall in like case be signed by the mayor, and sealed with the seal of the borough."

By the act referred to, 55 G. 3. *c.* 51., it is enacted, sect. 8., "that in such place or places where there is no poor's rate, or overseer of the poor, or churchwarden, or other officer, necessary for the execution of the provisions of this act, residing within the limits of the jurisdiction of the justices of the peace of the county requiring such returns, and in which there is any property liable to the poor's rate, but not rated or assessed thereto, it shall and may be lawful for the said justices of the peace of the county, assembled as aforesaid, or for the justices of the peace resident in and acting for any division of the county, in which such place or places are

situate, at any petty sessions or adjournment thereof, to be holden by them within such division as aforesaid, and they are hereby authorized and required, to appoint one or more proper person or persons to act as overseer or overseers or other such officer as aforesaid, who is and are hereby authorized, empowered, and required to act within such place or places respectively, for effecting the purposes of this act; and such person or persons respectively shall have the like powers vested in him or them, and shall be subject to the same regulations and penalties for effecting all such purposes, as fully and effectually to all intents and purposes, as if he or they had been appointed overseer or overseers of the poor, or churchwarden or churchwardens, or other officer or officers, under any law or laws now in force." And by the twelfth section of that act it is enacted, "that it shall be lawful to and for the justices of the peace of any county, or the major part of them, in general or quarter sessions, or at any adjournment or adjournments thereof, assembled, as often as they shall have deemed it necessary, to make a rate or rates, assessment or assessments, on all the rateable property within the limits of their jurisdiction, according to the fair annual value of the same, as derived from any or all of the several sources of information which are herein-before mentioned; and they are hereby authorized and empowered to order warrants to be from time to time issued, in the same manner as now authorized and practised by law for collecting the county rates, to the several high constables, within their respective counties, ordering and requiring them to issue their warrants to the respective overseers of the poor within their respective divisions, to levy, collect and pay to the said high constables, within a time to be named and limited in a warrant to be issued from the sessions as aforesaid, all such rate or rates, assessment or assessments, which each high constable shall, and he is hereby directed and required to pay, at such time as shall be

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specified in such warrant, to the treasurer of the county for the time being, to be applied and disposed of in such manner and for such purposes as the county stock or rate is now applicable, or may hereafter be made applicable by law; and in case any overseer or overseers of the poor, or other person appointed to act as such under the provisions of this act, in any of the several parishes, townships, or places, whether parochial or otherwise, within any county liable to pay the same, shall neglect, make default, or refuse to pay the same, within the time to be specified and limited for that purpose as aforesaid, to the high constable of the division within which such overseer or overseers, or other person or persons so liable and neglecting to pay, shall reside, or be appointed to act, it shall and may be lawful for any justice of the peace of the said county, upon complaint thereof made by any such high constable, by warrant under the hand and seal of any such justice, to levy the same by distress and sale of the offender's goods; and the overseer or overseers of the poor of any parish, township, or place, whether parochial or otherwise, or other person or persons appointed to act as such overseer or overseers, shall and may, and is and are hereby empowered to levy and raise, *by any equal rate or assessment upon all and every the several estates and property rateable to the relief of the poor within their respective parishes, townships, or places, whether parochial or otherwise*, such sum and sums of money as shall be required and necessary, in order to raise the several sums assessed upon such parishes, townships, or places respectively, or to reimburse such overseer or overseers, or other person or persons as aforesaid, such sum or sums of money as they shall respectively have paid on account of the same; such rate or assessment to be paid by the occupier or occupiers for the time being of such estates and rateable property as aforesaid."

3., after reciting that "it would be incon- oppressive to many townships or places, of money which may be assessed on them, county rate under this act, should be paid ate made for the relief of the poor, where ate doth not apply separately and distinctly , township, or place," it is enacted, "that lawful for the justices of peace, at their quarter sessions, or at any adjournment ey shall think convenient, to order the sum rected to be assessed as or for the county such parish, township, or place, whether otherwise, to be paid and levied on the ns, overseers, or petty constables of or for rish, township, or place, in such manner as herein directed to be paid and levied in no rate is made for the relief of the poor; erein contained, or any law, usage, or cus- ontrary notwithstanding."

W. 4. & 1 *Vict. c.* 81. *s.* 3. (which received ent on the 17th of *July* 1840), it is enacted, ry case in which any parish or place liable its own poor, shall be partly within and ut any such borough, and in the case of parochial place wholly or partly within orough, the council of the borough shall or more proper person or persons to act as overseers within that part of such parish, or ace which is within the borough, for making, collecting any such borough rate or watch ; and in every such case of a divided parish the borough is not liable to the county rate, of the peace having jurisdiction over that parish or place which is not within the all appoint one or more proper person or ct as overseer or overseers within that part

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of such parish or place which is not within the borough for making, levying, and collecting the county rate therein; and the person or persons so respectively to be appointed shall have the like powers vested in him or them, and shall be subject to the same regulations and penalties, for levying and collecting any such borough rate, watch rate, or county rate within that part of such parish or place for which he or they is or are appointed, as if he or they was or were appointed overseer or overseers of the poor under any law or laws now or hereafter to be in force."

By virtue of the powers conferred on them by the ninety-second section of the Municipal Corporation Act, the council of the borough of *Stockport*, on the 12th of *July* 1837, ordered a borough rate, in the nature of a county rate, to be made and assessed on the township of *Cheadle Buckley*, in respect of that portion of it which was within the borough of *Stockport*, namely, the hamlet of *Edgeley*, at the sum of 93*l.* 11*s.* 9*d.* The plaintiff, who was the overseer of *Cheadle Buckley*, and who resided in the hamlet of *Edgeley*, being the part of the township which was within the borough of *Stockport*, was called upon to levy and pay the above assessment. Having failed to do so, he was, upon the complaint of the high constable of the borough, summoned before the mayor, and having refused to appear upon such summons, or to pay the assessment, a warrant was issued under the hand of the mayor, sealed with the seal of the borough, to levy the assessment by distress and sale of the plaintiff's goods. By virtue of the warrant the high constable seized the goods of the plaintiff, and kept them until the amount of the assessment was paid.

The plaintiff having commenced an action of trespass for such seizure of his goods, the cause was tried before *Williams* J., at the Spring assizes for the county of

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heshire, in 1839. In order to prove the warrant and levy, *Sadler*, the high constable (who had been served with a *subpœna duces tecum*), was called on the part of the plaintiff. He stated that he had made the levy under the warrant, and that he had no doubt he had deposited the warrant in his office; that he had searched for it but could not find it; that he did not know what had become of it; and that the town-clerk had access to his office.

It was objected on the part of the defendant, that his was not sufficient to let in secondary evidence of he contents of the warrant, but that to entitle the plaintiff to give such secondary evidence, the defendant hould have been served with a notice to produce the arrant, and the town-clerk with a *subpœna duces tecum*. he counsel for the plaintiff assimilated the case to that f the bailiff of a sheriff, whose duty it is to keep warrants or his own protection and security, and submitted that s the officer who had the custody of the warrant in uestion did not know what had become of it, the preumption was that it was lost or destroyed. The obection was over-ruled, and secondary evidence of the arrant was received.

It was then contended for the defendant, that the ction was misconceived, as trespass could not be maintained against the defendant; first, because he had jurisiction to issue the warrant; and, secondly, because the going of the warrant was a mere ministerial act.

The jury, under the direction of the learned judge, nd their verdict for the plaintiff, damages 93*l.* 11*s.* 9*d.*, ve being reserved for the defendant to move to enter onsuit upon the two latter grounds.

ervis, in *Easter* term, 1839, moved accordingly for le to shew cause why a nonsuit, or a verdict for the ndant, should not be entered. He contended, as at

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the trial, that the action was misconceived, the sig of the warrant being merely a ministerial act; and that the defendant had jurisdiction to issue the war the assessment being properly made on the towr of *Cheadle Buckley*.

He likewise moved for a new trial, on the gr that secondary evidence of the warrant was improp received, and submitted that the case differed from of a sheriff's officer, to which it was compared at trial. A sheriff's officer has a warrant delivered him, but the writ on which it is founded is retained the sheriff for his protection; whereas, in the pre case, the only protection that the defendant had was warrant, inasmuch as the rate without the war afforded no justification.

The Court refused a rule upon the last ground, granted a rule *nisi* upon the two former points, ag which

Kelly, *John Evans*, and *Welsby*, on a former d this term, shewed cause. It is submitted that the fendant had no jurisdiction to issue the warran question, inasmuch as the council of the borou *Stockport* had no authority, in respect of the borough to make the assessment upon the township of Ch *Buckley*, which the plaintiff was called on to levy pay. By the ninety-second section of the Muni Corporation Act, the council of the borough were powered to levy a borough rate, and for that pur were to have all the powers which justices of the p possess under the 55 *G.* 3. *c.* 51. On reference to t statute, it will be found that it contains no provision meet a case like the present. This case does not within the twelfth section of the act, for that section only applicable where the whole parish, township district is situate within the county for which the m

is to be made. Neither does the case come within either the words or the meaning of the eighth section, which also is confined to places which are wholly within the county, but for which there is no poor rate or overseer. In the township of *Cheadle Buckley* there are both a poor rate and an overseer, and part only of the township is within the borough of *Stockport*. It is therefore clear that the last-mentioned section does not by reference authorise the council of the borough to appoint a person to act as overseer within the hamlet of *Edgeley*, for the purpose of levying the borough rate, there being already an overseer for the whole township, of which the hamlet forms a portion. But if it should be considered that the present case is within the eighth section, it is enough to say that the council have not followed the course thereby prescribed; for instead of appointing a person to act as overseer, they have required the plaintiff, as overseer of the whole township, to levy and pay the assessment. The plaintiff could neither levy a borough rate upon the hamlet of *Edgeley*, nor take the amount out of the funds of the whole township, when a part only of the township was liable to the rate; and if he had paid the rate voluntarily out of his own pocket, he would have possessed no means of reimbursing himself. The 7 *W.* 4. & 1 *Vict. c.* 81. (passed five days after this rate was made) recites that overseers had no power to pay the borough rates out of the poor rate, or otherwise to levy them upon the inhabitants; and that act, by the third section, expressly provides for the levying and collecting of borough rates in places situate like the township of *Cheadle Buckley*, partly within and partly without any borough. That act is therefore a legislative declaration that there was no provision in the former statutes applicable to such a case, and that under their enactments an overseer had no power to make a rate over a portion of a parish or

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township. *The King* v. *The West Riding of Yorkshire* (*a*), which was cited when this rule was obtained, has no bearing upon the present case, for by the decision there, nothing was taken out of the pockets of parties who were not legally liable to the rate.

The action is properly conceived. Where a magistrate acts, either without jurisdiction or exceeds his jurisdiction, trespass is the proper remedy. In *Lowther* v. *The Earl of Radnor* (*b*), the magistrate had jurisdiction, and that was the ground of the decision. In *Branwell* v. *Penneck* (*c*) it was held, on the other hand, that the magistrate had no jurisdiction, and that, therefore, he was properly suable in trespass. And *Day* v. *King* (*d*) shews that, where magistrates have jurisdiction, but they make an order and warrant which are defective by reason of their not adjudicating upon facts essential to their jurisdiction, they are liable to be sued in trespass. This case is distinguishable from *Pike* v. *Carter* (*e*), for here the warrant, on the face of it, discloses a want of jurisdiction in the defendant, shewing that the assessment was to be made, not on the whole, but on a fraction of the township.

Jervis, *Cottingham*, and *Townsend*, in support of the rule. The question in this case turns upon the provisions of the 55 G. 3. c. 51., which are embodied, in the fullest manner, in the ninety-second section of the Municipal Corporation Act. That section says, that the councils of boroughs are to have all the powers possessed by county justices under the 55 G. 3. c. 51., "or as near thereto as the nature of the case will admit." These words shew that the legislature knew that the enactments of the County Rate Act could not be car-

(*a*) 12 *East*, 117.
(*b*) 8 *East*, 113.
(*c*) 7 *B.* & *C.* 536.; 4 *M.* & *R.* 408.
(*d*) 5 *Ad.* & *E.* 359.
(*e*) 3 *Bingh.* 78.; 10 *Moo.* 376.

ried into precise effect when applied to the levying of borough rates, and that they intended a liberal construction to be put upon the powers so given to the councils of boroughs by reference to those possessed by the justices of counties. It is submitted that the twelfth section of the *55 G.* 3. *c.* 51., as incorporated in the Municipal Corporation Act, gives a general authority to councils of boroughs to order the borough rates to be levied on all places possessing overseers; and taking that section in connection with the thirteenth, such councils, where only part of a parish or township is within the borough, as is the case here, may order the sum of money directed to be assessed as and for the borough rate, to be levied on the churchwardens, overseers, or petty constables of such parish or township. This construction is borne out by the language of the thirteenth section, which speaks of "parish, township, or place," and the latter word is evidently used for something that is distinguishable from a township, and is applicable to a smaller district. If this be so, the council of the borough of *Stockport* had authority to make an assessment upon the township of *Cheadle Buckley*, in respect of that portion of it, namely, the hamlet of *Edgeley*, which was within the borough; and the defendant had jurisdiction to issue the warrant in question to enforce the payment of such assessment from the plaintiff. In *The King* v. *The West Riding of Yorkshire*, the court held that the words in the third section of the *12 G.* 2. *c.* 29., "in case no rate shall be made for the relief of the poor in any parish," &c., were to be understood as meaning no poor rate co-extensive with the district assessed. Putting a like liberal interpretation upon the twelfth and thirteenth sections of the *55 G.* 3. *c.* 51., those two sections enable justices to order a county rate to be levied upon a parish or township, where only part of such parish or township is within

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the county, and consequently by the embodying of the provisions of that statute in the Municipal Corporation Act, the council of the borough of *Stockport* were empowered to make the assessment in question upon the township of *Cheadle Buckley*, in respect of that part of it which is within the borough. It is said, on the other side, that the council of the borough should have appointed a person under the eighth section of the 55 G. 3. c. 51., to act as overseer in levying the assessment upon that part of the township of *Cheadle Buckley* which is within the borough. That section, however, is clearly only applicable to places which do not possess an overseer. Here, there is an overseer for the township, and it would therefore have been superfluous to appoint another.

Secondly, it is submitted that trespass will not lie against the defendant. If he had jurisdiction to issue the warrant, then it is clear the action cannot be maintained, *Lowther* v. *The Earl of Radnor*. It is also contended that the signing of the warrant was a mere ministerial act. All the necessary preliminary proceedings were regularly taken, the rate was made, the summons served, and the defendant appears to have received no intimation of any fact which shewed that he had no jurisdiction; for in signing the warrant he was acting ministerially in his capacity of a magisterial officer, as required by the statute, and not as a member of the council. This case is therefore similar to *Pike* v. *Carter* (*a*), where it was held that trespass will not lie against a magistrate for any thing done in the discharge of his duty, unless he is made acquainted with all the circumstances under which he is called on to act. [*Erskine* J. There, the magistrate was not informed of the fact which shewed that he had no jur-

(*a*) 3 *Bingh.* 78.; 10 *Moore*, 376.; *suprà*, 500.

ction; here, the want of jurisdiction appears on the ce of the warrant.]

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Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the urt. The question in this case was brought before upon a motion by the defendant to set aside the verct found for the plaintiff, and to enter a verdict for e defendant, or otherwise to enter a nonsuit. The cause as tried before my brother *Williams* at the Spring sizes for 1839, at *Chester*, when the plaintiff obtained verdict for 93*l.* 11*s.* 9*d.* The declaration was in tresass for seizing and impounding the plaintiff's goods, to hich the defendant pleaded not guilty.

It appeared on the trial, that at the time of the seizure omplained of, the plaintiff was overseer of the poor of he township of *Cheadle Buckley*, and resided in the amlet of *Edgeley* which formed a part of that townhip; and that the defendant was mayor of the borough f *Stockport*. By statute 2 & 3 *W.* 4. *c.* 64. *s.* 35. the mlet of *Edgeley* was included within the limits of the rough of *Stockport*, while the rest of the township of *eadle Buckley* was left, as before, within the county at ge.

By the statute 5 & 6 *W.* 4. *c.* 76., "An act to provide r the regulation of municipal corporations in *England* d *Wales*," certain powers were given to several corrations, and among others to the corporation of the rough of *Stockport*. And it was by the seventh secn of that act provided, that the boundaries of such roughs should, for the purposes of that act, be the me as the limits settled and described by the statute & 3 *W.* 4. *c.* 64., thus making the hamlet of *Edgeley*, part of the borough of *Stockport* for all the purposes the Municipal Corporation Act. Amongst other wers given by that statute to the corporation, the

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council of the borough were, by the ninety-second section, authorised, and required, from time to time, to order a borough rate, in the nature of a county rate, to be made within the borough, and for that purpose were to have within their borough all the powers which the justices of the peace assembled at their general or quarter sessions in any county in *England* had, within the limits of their commission, by virtue of the act *55 G. 3. c. 51.*, or as near thereto as the nature of the case would admit. And it was further provided, that all warrants required by the county rate act to be issued under the hands and seals of two or more justices, should in like case be signed by the mayor, and sealed with the seal of the borough. By virtue of the powers conferred by this clause, the council of the borough of *Stockport*, on the 12th *July*, 1837, ordered a borough rate, in the nature of a county rate, to be made, and assessed the township of *Cheadle Buckley*, in respect of that portion of it that was within the borough of *Stockport*, at the sum of 93*l.* 11*s.* 9*d.*; and the plaintiff, as overseer of *Cheadle Buckley*, having been called upon to levy and pay this assessment, and having failed to do so, was, upon the complaint of the high constable of *Stockport*, summoned before the mayor, and having refused to appear upon such summoning, or to pay the assessment, a warrant was issued under the hand of the defendant, as mayor, and under the seal of the borough, to levy the same by distress and sale of the goods of the plaintiff; and by virtue of this warrant, the constable of the borough seized the plaintiff's goods, and kept them until he paid the amount of the assessment. And this seizure was the trespass complained of by the plaintiff in this action.

At the trial of the cause, it was objected, on the part of the defendant, that trespass would not lie; first, because there was no want of jurisdiction on the part of the defendant, a magistrate, and consequently that case,

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nd not trespass, was the proper remedy; and, secondly, ecause the act of the defendant, in signing the warrant, as a mere ministerial act, and therefore that he was not esponsible in this form of action. A verdict, however, as taken under the direction of the learned judge for he plaintiff. The defendant afterwards obtained a rule to shew cause why that verdict should not be set aside and a verdict entered for him, or otherwise a nonsuit entered, on the grounds of objection taken at the trial.

Upon the argument, it was insisted by the counsel for the plaintiff that the defendant had no jurisdiction to issue any warrant to levy the assessment in question upon the plaintiff's goods; and that the seizure of the plaintiff's goods having been made under that warrant, trespass was the proper remedy for the wrongful seizure made by the defendant's direction.

The ninety-second section of the Municipal Corporation Act having directed, as we have seen, that all warrants required by the *55 G.* 3. *c.* 51. to be issued under he hands and seals of two or more justices, should in ike case be signed by the mayor, and sealed with the eal of the borough, in order to ascertain whether the mayor had jurisdiction to issue this warrant, it is necessary to refer to the statute *55 G.* 3. *c.* 51., and to see whether, in the case of a county rate made by the justices of the peace at the general or quarter sessions, two justices of the peace would have had jurisdiction to issue a similar warrant, if the hamlet of *Edgeley* had been situated within the county rated, and the rest of the township had been within an adjoining county.

By *55 G.* 3. *c.* 51. *s.* 12., power is given to the justices of the peace of any county in general or quarter sessions assembled, to make a rate and assessment on all the rateable property within the limits of their jurisdiction, and to order the high constable to issue his warrant to the respective overseers of the poor within his division, to levy,

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collect, and pay to the said high constable all such rates and assessments, to be by him paid over to the treasurer of the county; and the same section then proceeds to enact, that in case any overseer of the poor or other person appointed to act as such, under the provisions of that act, in any of the several parishes, townships, or places, whether parochial or otherwise, within any county liable to pay the same, should neglect, make default, or refuse to pay the same, within the time to be specified and limited for that purpose, to the high constable of the division within which such overseer or overseers, or other person or persons so liable and neglecting to pay, should reside or be appointed to act; it should and might be lawful for any justice of the peace for the said county, upon complaint thereof made by any such high constable, by warrant under the hand and seal of any such justice, to levy the same by distress and sale of the offender's goods; and the overseer and overseers of the poor of any parish, township, or place, whether parochial or otherwise, or other person or persons appointed to act as such overseer or overseers, should, might, and was and were thereby empowered to levy and raise by an equal rate or assessment upon all and every the several estates and property rateable to the relief of the poor within their respective parishes, townships, or places, whether parochial or otherwise, such sum and sums of money as should be required and necessary in order to raise the several sums assessed upon such parishes, townships, or places respectively, or to reimburse such overseer or overseers, or other person or persons as aforesaid, such sum or sums of money as they should respectively have paid on account of the same, such rate or assessment to be paid by the occupiers for the time being of such estates and rateable property as aforesaid.

It is to be observed, that this section speaks of over-

seers of the poor and of persons appointed to act as such under the provisions of that act.

And on the part of the plaintiff it was contended, that this section only authorised the justices to levy the assessment on the overseers of any parish or township, when *the whole parish or township* was situate within the county for which the rate was made. But that wherever an assessment was made *upon any part of a parish or township*, &c. which was partly situated in one county and partly in another, some person should be specially appointed to act as overseer, for that part of the parish or township which was within the county, and the assessment should be levied upon him, and then he would be authorised by the twelfth section to levy a rate upon the occupiers of property within that particular district. And we were referred to the eighth section of the statute, as pointing out in what cases a person was to be specially appointed for that purpose. By that section it is enacted, that in places where there is no poor rate, or overseer of the poor, or other officer necessary for the execution of the provisions of that act, and in which there is any property liable to the poor's rate, but not rated or assessed thereto, it should be lawful for the justices at general or petty sessions to appoint proper persons to act as overseers, who were empowered and required so to act, and were thereby invested with all the powers, and subjected to all the regulations, of overseers of the poor, for the purposes of that act. To this construction of the twelfth section it was objected, on the part of the defendant, that as the hamlet of *Edgeley* was not a place where there was no poor's rate or overseer of the poor, but a place in which all the rateable property had been rated and assessed to the poor, it was not within the express provisions of the eighth section; and that, as the plaintiff came within the terms of the twelfth section, as overseer of the poor

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of the township, it was unnecessary to appoint any person to act as overseer in a part of that township.

But it is to be observed, that the latter part of the twelfth section, which authorises the overseer or other officer to levy a rate for the payment of the assessment to reimburse themselves, only authorises them to do so by an equal rate on *all* the rateable property within *their respective parishes, townships, or places*, and, therefore, wherever the poor rate and county rate are not co-extensive, a literal interpretation of the eighth and twelfth sections must be productive of hardship and inconvenience. This had been felt under the former statute of 12 *G.* 2. *c.* 29., in which are to be found sections in effect similar to the eighth and twelfth of the 55 *G.* 3. *c.* 51.; and to avoid this inconvenience, the court of King's Bench, in the case of *Rex* v. *The West Riding of Yorkshire* (*a*), held that the words in that act, "where there is no poor rate" must be construed as meaning, where there is no poor rate co-extensive with the district assessed, and that in such a case a person should be specially appointed to act as overseer for that district; and the statute 55 *G.* 3. *c.* 51. has adopted that construction; for, by the thirteenth section, after reciting that "it would be inconvenient and oppressive to many townships or places, that the sum of money which might be assessed on them, as or for a county rate under that act, should be paid out of any rate made for the relief of the poor, where such poor rate did not apply separately and distinctly to the parish, township, or place," the justices are empowered to order the sum of money directed to be assessed, as or for the county rate, on any such parish, township, or place, to be paid and levied in such manner as the same was therein directed to be paid and levied in cases where no rate is made for the relief of the poor.

(*a*) 12 *East*, 117.

ore, the rate under discussion had been a , there would have been no difficulty in : portion of it that might be payable by the *dgeley*, upon the occupiers of rateable pro- *gely, through a person specially appointed for* . But it has been said that the recital and of the 7 *W.* 4. & 1 *Vict. c.* 81. shew that this ıve been done, and that, inasmuch as that only to borough rates, and not to county ifficulties admitted by that statute to have existed with respect to the borough rates ıe to exist with respect to county rates.

argument rests upon a misapprehension of ıd effect of that statute, which was passed to fect in the Municipal Corporation Act, in extend to borough rates some of the pro- h the 55 *G.* 3. *c.* 51. had made with respect ıtes.

be observed, that there are three distinct n by the twelfth section of 55 *G.* 3. *c.* 51. ower of the justices in sessions to make the sue warrants for its collection by the high secondly, the power given to the justices ns to issue a warrant for the levy of the rate ods of any overseer, &c. refusing to pay the to the high constable; and, thirdly, the e overseers or persons appointed to act as y by rate the sums assessed, or to reimburse by a special rate such sums as they shall n account of the county rate.

ninety-second section of the Municipal Cor- t, though it gives the same powers to the ake the rate, and confers upon the mayor of levying by distress the assessment upon rs and other collectors of rates, makes no vision authorising the overseers of the poor

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to pay such assessment out of the poor rates, or to make any special rate to reimburse themselves the amount paid over to the borough rate; and doubts having arisen whether, in the absence of any such express provision, the overseers would be justified in so applying the rates in their hands, or in levying a special rate to reimburse themselves, according to the provisions of the County Rate Act, the statute 7 *W.* 4. & 1 *Vict.* *c.* 81. was passed; the first section of which, after reciting that no authority was given by 5 & 6 *W.* 4. *c.* 76. to the churchwardens, overseers, or other persons who might thereby be legally ordered to pay or levy such rates, to pay the same out of the poor rate of such parishes or places, or otherwise to levy the same upon the inhabitants thereof, authorises the council to order the overseers to pay the assessment of the borough rate out of the poor rate, or to make and collect a pound rate for the purpose.

And then, inasmuch as this provision would not apply to extra-parochial places or to parishes, or townships partly within and partly without the borough, the third section expressly provides for such cases, and thus the omissions in the Municipal Corporation Act with respect to the borough rate are completely supplied, and the borough rate and county rate are placed on the same footing for the future in respect of extra-parochial places and divided parishes.

We are therefore of opinion that the defendant has adopted a course not warranted by law, and that he had no jurisdiction to levy the assessment made upon *Edgeley*, by distress upon the goods of the overseer of *Cheadle Buckley*, though resident within the borough; for although, from the defect in the Municipal Corporation Act, a person specially appointed to act as overseer for the hamlet of *Edgeley* might not, before the passing the stat. 7 *W.* 4. & 1 *Vict.* *c.* 81., have been

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justified in levying the borough rate upon the occupiers of the hamlet, yet such defect could not authorise the defendant to levy the rate upon the plaintiff, who was equally incapable of reimbursing himself by such a rate.

Upon the second ground of objection it is hardly necessary to say more than this, that as the seizure was made under a warrant signed by the defendant, and therefore made by his direction, and as he had no jurisdiction to issue any such warrant, trespass, and not case, was the proper remedy.

We are therefore of opinion that the verdict is right, and that the rule obtained by the defendant must be discharged.

Rule discharged.

ROBERTSON *v.* SHEWARD and GREATWOOD.

A. being manager of a joint stock bank, having its principal establishment in *London*, with branch banks in *Birmingham* and other places, at which there are local managers, a note is taken at the *Birmingham* branch bank to secure an account there, by which *B.* promises to pay 1000*l.* to the manager of such joint stock bank. In an action by *A.* in his own name upon the note, upon a plea of *non fecit*, and a plea that plaintiff was not manager of such joint stock bank, *A.* is entitled to a verdict upon both issues.

In this state of the record it is not open to the defendant to contend that the plaintiff should have sued as the public officer of such joint stock bank.

ASSUMPSIT. The declaration stated, that before, and at, and after the time of the making of the promissory note therein mentioned, the plaintiff was the manager of a certain bank, called "The National Provincial Bank of *England*;" that the plaintiff being such manager, the defendants and one *William Chapman*, deceased, 26th *March* 1836, made their promissory note in writing, and thereby promised to pay the plaintiff, by the name and description of the manager of the

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Provincial Bank of *England*, 1000*l.* three months after demand, and then delivered the note to the plaintiff, and promised the plaintiff to pay the same according to the tenor and effect thereof, yet the defendants had not paid the same, or any part thereof, nor did *Chapman* in his lifetime pay the same or any part thereof, but the same was still wholly due and unpaid, to the damage, &c.

Defendant *Sheward* pleaded the following pleas:— First, that the defendants did not make the note.(a) Secondly, that payment was not demanded, *modo & formâ*. Thirdly, that plaintiff was not manager of the bank, *modo et formâ*. Fourthly, that the note was made and given to the plaintiff, and accepted and received by him on behalf of the bank, and as security only for an account about to be opened by Messrs. *Chapman* and *Brown*, until certain leases and mortgages should be deposited with the bank; and such leases and mortgages were so deposited before payment of the note was demanded; and that *C.* and *B.* paid the bank, and the bank accepted, the amount due at the time of such deposit in full satisfaction and discharge thereof, and of all causes of action in respect thereof. Fifthly, that the note was given to the plaintiff on behalf of the bank, as security only for the amount of *C.* and *B.* until they should have secured same by mortgage of certain premises; that *C.* and *B.* were ready to give such mortgage, but that the bank, in fraud of the defendants, induced *C.* and *B.* to give a mortgage of the same premises for another debt, and on a different account, and pre-

(a) This plea appears to be bad, because, though if found in the negative it would bar the action, yet if found in the affirmative it would not appear whether the note was made by the defendants jointly with *Chapman*. It is, however, the common course in practice, for one of several defendants who pleads alone, to plead that he did not promise, instead of using the less exceptionable form of pleading, "that he and his co-defendants did not promise."

vented the giving of such mortgage for the banking account as agreed; whereby defendants were discharged; and that *C.* and *B.* paid to the bank divers sums of money, amounting to all the moneys due and owing by *C.* and *B.* to the bank, at the time of the obtaining of the last-mentioned mortgage, in full satisfaction and discharge of the same debt and moneys, and of all causes of action of the bank in respect thereof: Verification. Sixthly, that the note was given to the plaintiff on behalf of the bank, as security for moneys to become due to the bank from *C.* and *B.*; and that the defendant *Sheward*, as such surety as aforesaid, is discharged by time being given to *C.* and *B.* in pursuance of an agreement (*a*) to that effect made by *C.* and *B.* and *J. T. Brown*, at the request of the bank without the knowledge of the defendant *Sheward*, by which agreement *C.* and *B.* and *J. T. B.* were to pay *C.* and *B.*'s balance of 1719*l.* 15*s.* 8*d.* by weekly instalments of 50*l.*: Verification. Seventhly, that the note was given to the plaintiff on behalf of the bank as security for *C.* and *B.*, as the bank well knew; that whilst *C.* and *B.* were indebted to the bank in 1719*l.* 15*s.* 8*d.*, and before the note had been presented, or any demand made for payment thereof, *C.* and *B.* delivered to the bank certain leases and mortgages of great value, to wit, &c., in substitution for and in full satisfaction and discharge of the note, and of all liability of the defendants in respect thereof; and the bank and the plaintiff, as such manager thereof, accepted and received such leases and mortgages in such substitution, and in such full satisfaction and discharge as aforesaid: Verification.

The Defendant *Greatwood* also pleaded seven pleas,

(*a*) It is not alleged that this agreement was under seal, or that it was signed by the parties, to be charged thereby, without which the engagement of *J. T. B.* would not bind him, and the agreement to give time, founded thereon, would be void. See *Case* v. *Barber*, *T. Jones*, 158, *T. Raym.* 450.

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which were similar to those of defendant *Sheward*, except that the third plea, instead of simply traversing the allegation, that the plaintiff was manager of the bank, stated as follows,—that the promissory note in the declaration mentioned, was a written promissory note in the words and figures, and of the purport and tenor and to the effect following; that is to say,

1000*l.* *Birmingham, March* 24th, 1836.

Three months after demand we promise to pay to the Manager of the National Provincial Bank *of England* the sum of one thousand pounds.

Witness, *Thomas Sheward.*
Wm. Greatwood, *William Chapman.*
18. *Temple Street.* *William Greatwood.*

And the plaintiff was not at the time of the making of the note, nor had been at any time since, manager of the National Provincial Bank of *England* in the said note, mentioned according to the true intent and meaning of the said note. Verification.

The replication joined issue upon the first, second, and third pleas of *Sheward*, and upon the first and second pleas of *Greatwood*. To the third plea of *Greatwood*, the plaintiff replied, that at the time of the making of the note he was and had since continually been such manager. To the fourth, fifth, and sixth pleas the plaintiff replied *de injuriâ*. To the seventh plea he replied that *C.* and *B.* did not deliver to the National Provincial Bank of *England*, nor did said bank or the plaintiff accept or receive the said leases and mortgages in satisfaction for or in full or any satisfaction of the said note, or of all or any liability of the defendant in respect thereof, *modo et formâ*.

The rejoinder joined issue upon the replications to the fourth, fifth, sixth, and seventh pleas of *Sheward*, and upon the replications to the third, fourth, fifth, sixth, and seventh pleas of *Greatwood*.

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At the trial before Lord *Denman*, at the last *Warwick* Spring assizes, the following facts appeared. The National Provincial Bank of *England* was established under the authority of the Joint Stock Bank Act, 7 G. 4. *c.* 46., carried on business at *Birmingham* and other places by means of branch banks, but having a general board of management under a board of directors, at which plaintiff was manager. The note in question was given at the branch bank at *Birmingham*, to secure advances to be made by the bank to *C.* and *B.*, at which time *W. Elrich* was the local manager at *Birmingham*. In *March* 1837 *C.* and *B.* became bankrupts. 3d *April* 1837 the following demand was served upon the defendants, addressed to the defendants and *William Chapman*.

"National Provincial Bank, *Birmingham*, 3d *April* 1837.

"Gentlemen,—We request payment for the note given by you to the bank at three months after demand, as security for the account of Messrs. *Chapman* and *Brown*.

(Signed) "*H. Rotham*, *E. Lloyd*, joint managers."

It was contended for the defendants that the demand of payment was insufficient to support an action at the suit of the plaintiff, assuming him to be the payee, and that, supposing the demand to be sufficient, the action should be brought by the bank, in the name of plaintiff suing as their public officer. But that the action should have been brought in the name of *Elrich*, who, being the manager at *Birmingham*, where the whole of the transaction took place, must be taken to be the manager intended by the note. The learned judge refused to nonsuit the plaintiffs, being of opinion that there was evidence to go to the jury that he was the manager intended in the note, and that the defendants had not raised the question as to the plaintiff's being the public officer of the company, that fact not having been traversed by

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the pleas. The jury having found a verdict for the plaintiff, damages 1135*l.*

Channell Serjt., in *Easter* term, obtained a rule *nisi* for a new trial, on the ground of misdirection.

Goulburn Serjt. now shewed cause. The plaintiff was manager of the National Provincial Bank of *England* at the time the note was made, and was the payee of the note: the action, therefore, was properly brought in his name. The bank could have sued in the name of their public officer if they had been the legal owners of the note, but the property in the note was in the plaintiff in his individual capacity, as a trustee for the bank. The action was therefore properly brought in the name of plaintiff: *Pease* v. *Hirst.* (*a*) There is no pretence for saying that *Elrich* was the manager designated in the note: he was not the manager of the National Provincial Bank of *England*, but merely a clerk managing a particular branch of that establishment.

Channell Serjt., in support of the rule. It appears upon the evidence that the plaintiff was the manager of the *London* establishment, but from the circumstances of the transaction it is clear that *Elrich*, the manager at *Birmingham*, where the whole transaction took place, was the manager designated in the note. This view of the case is corroborated by the subsequent conduct of the parties, the demand of payment being made, not by or on behalf of plaintiff, but by *Rotham* and *Lloyd*, the successors of *Elrich*. As the plaintiff sues in his own right, and not as the public officer of the bank, the defendants could raise the question as to his being the payee only by denying that he was the manager of

(*a*) 10 *B. & C.* 122.; 5 *M. & R.* 88.

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the National Provincial Bank of *England*, according to the true intent and meaning of the note, as they have done by their third plea.

TINDAL C. J. The principal objection in this case arises upon the third plea, which is, in effect, a plea that the action is not brought in the right name. It appears that there is a bank called the National Provincial Bank of *England*, having its principal establishment in *London*, with branches in different parts of the country, not distinguished by any separate name, but all or in part of the same undertaking, as if a banker in *London* were to hire rooms in a distant market town, and transact business there by a clerk on market days. There is nothing but the date of the note, at *Birmingham*, upon which any doubt can be attempted to be raised; but it distinctly appeared that plaintiff was the general manager of the undertaking. I think, therefore, that the plaintiff is entitled to retain his verdict upon the third plea. To raise the other point, it should have been pleaded, that the National Provincial Bank of *England* was a copartnership or company within 7 *G.* 4. c. 46., and that the plaintiff was not the registered public officer.

COLTMAN J. The only substantial question between these parties, namely, whether the note was to remain as a security only until certain deeds should have been deposited, was decided in favour of the plaintiff. Upon the objection that *Elrich*, the person who received the note from the defendants, ought to be considered as the payee of that note and not *Robertson*, the general manager of the establishment, I think the jury drew the proper conclusion from the evidence. With respect to the demand of payment being made by *Rotham* and *Lloyd*,

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and not by plaintiff, I think that there is an impli power in them as the chief clerks of the local branch call upon persons to pay up.

ERSKINE J. It is contended that the affirmation the issue raised by the first plea is not proved, and th the plaintiff has also failed upon the third plea, t note having been given not to the plaintiff but to *Elri* If there had been two distinct banks of the same nan the one carried on in *London* and the other at *Birmi ham*, the circumstance of the transaction taking pl at *Birmingham*, and being there negotiated by the *B mingham* manager, would have strongly tended to sh that *Elrich* was the person to whom the note had be made payable. But the plaintiff was the manager the whole establishment, which, though under the s perintendence of a board of directors in *London*, w effectively carried on in the country; as in *London* th establishment could not carry on business as banke 7 *G.* 4. *c.* 46. *s.* 3. The description in the note the fore applies better to the plaintiff than to any other pers It is said that this question as to which manager was tended in the note was not left to the jury, but t learned judge was not requested so to leave it, nor w any such point raised in the observations which t learned counsel addressed to the jury.

MAULE J. I think that the plaintiff was entitled to verdict upon the issue raised upon the first plea. was not even put to the jury, that *Robertson* was n the manager of the bank intended by the plea. If th question had been submitted to the jury by the coun for the defendants, they would have had no hesitation finding a verdict against him. The note evidently co templates one manager only. The third plea is argumentative denial of the making of the note.

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It is said that *Robertson*, not being the payee of the note by name, it should have appeared that he was the public officer of the bank. It is sufficient to say, that that objection does not arise upon the present state of the record.

Rule discharged.

Ex parte TUCKER; in the Matter of SARAH INMAN, deceased.

The jurisdiction to determine whether a married woman has power to make an appointment in the nature of a will, appears to belong to the Queen's temporal courts. (a)

IN *Easter* term, *Manning* Serjt. obtained a rule calling upon *William Southcote Inman* and *Anna Victoria Little*, to shew cause why a writ of prohibition should not issue to the Prerogative Court of *Canterbury*, to prohibit that court from proceeding to require *William Tucker*, *John Inman Tucker*, and *John James* to appear in the said court, and to leave in the registry thereof the original will of *Sarah Inman* deceased, and from proceeding to require them to shew cause to that court why letters of administration, with the said will annexed, of the goods, chattels, and credits of the said *Sarah Inman* should not be granted to the said *William Southcote Inman* and *Anna Victoria Little*. This rule was obtained upon an affidavit which stated the following facts: —

Previously to the marriage of *George Inman*, clerk,

(a) And see *Langdale's* 12 *Co. Rep.* 50.; *Cases of Prohibition*, *ib.* 76.; *Edward's Case*, 13 *Co. Rep.* 9.; *Kenn's Case*, 7 *Co. Rep.* 44. *b.*; *Bonsey* v. *Lee*, 3 *Lev.* 72.; *Farley's Case*, *Cro. Jac.* 36.; *post*, 536. Although the Ecclesiastical Courts have jurisdiction in defamation, prohibition lies not only if a party be libelled there for words cognisable by the temporal courts, but also where the words are not sufficient to justify proceedings, either in a spiritual or in a temporal court.

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with *Joan Darch*, spinster, certain hereditaments at *Blagden*, county *Somerset*, were conveyed to the use of *George Inman* for life, remainder to the use of the wife for life, remainder to the use of such child or children of the marriage in such shares and proportions, and for such estates as *George Inman* should limit, direct, appoint, give, grant, or devise, in manner therein mentioned, and in default thereof to the use of the first son in tail.

There was issue of this marriage *George*, *Henry*, *John*, and *Sarah*.

By lease and release of 31st of *December* 1794, and 1st of *January* 1795, the release being made between *George Inman*, clerk, another *John Inman*, then husband of *Sarah Inman*, the daughter of *George Inman* clerk, and *John Whitley* of the other part; *George Inman*, clerk, appointed the said hereditaments to *John Inman* the husband and *John Whitley*, and their heirs, upon trust to receive the rents and profits, and to apply the same or so much thereof as should be necessary in the maintenance of *George Inman*, the son, for his life, and after his decease, as to one moiety of the said hereditaments, as the son *Henry Inman* should appoint; and in default thereof to the use of *Henry Inman* and his heirs, and as to the remaining moiety of the said hereditaments as *Sarah Inman* should appoint, and in default thereof to the use of the said *George Inman*, clerk, and his heirs; in which release was contained a declaration that in case the said trustees during their joint lives should think it more beneficial to sell the said hereditaments, it should be lawful for them to do so, and to place out the net produce and apply the interest towards the maintenance of *George Inman*, the son, in the same manner as the rents, and at his decease to pay all such money together with all interest then due and in the hands of the trustees or the survivor or his heirs, unto *Henry*

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Inman and *Sarah Inman*, their heirs, executors, administrators, and assigns, equally between them absolutely. Neither the share of *Henry Inman* in the moneys arising from any sale, was by the indenture of release subjected to any power of appointment.

George Inman, clerk, dying shortly after, and doubts being entertained whether the power of appointment contained in the release authorised an appointment, not to children, but to trustees for their benefit, and *George Inman*, the son, being tenant in tail, subject to the power, a recovery was suffered in *November* 1795 by *George Inman*, the son, the uses of which recovery were by an indenture of release, dated the 6th of *November* 1795, grounded on a lease for a year between *George Inman*, the son, of the first part, *Henry Inman* and his wife, and *John Inman*, the son-in-law, and *Sarah* his wife, and *John Whitley* of the second part, *Robert Blake* of the third part, and *Peter Cox* of the fourth part, declared to be to *John Inman* the husband, and *John Whitley*, upon trust, to sell and invest the produce, and to apply the dividends towards the maintenance of *George Inman*, the son, for his life, and to apply the rents and profits until the sale in like manner; and after the decease of *George Inman*, the son, to stand possessed of the trust moneys and future interest or dividends upon trust for *Henry Inman* and *Sarah Inman*, in equal shares, or in trust for their respective executors, &c., in case they, or either of them, should die in the lifetime of *George Inman*, the son, and to pay and transfer the same accordingly.

The hereditaments were sold immediately after the suffering of the recovery.

By indenture of 24th *February* 1802, between *George Inman*, the son, of the one part, and *John Inman* the son in law, and *John Whitley* of the other part, but executed by *George Inman*, the son only, after reciting the release

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of the 1st of *January* 1795 as to the appointment thereby made of the said hereditaments, and the uses thereby declared thereof, but wholly omitting the particular trust thereby declared with respect to the application of the moneys arising from any sale of the said hereditaments, and after a short recital of the release of the 6th of *November* 1795, and of the recovery suffered in pursuance thereof, and that the said hereditaments had been sold, and that *George Inman*, the son, was desirous and willing that the purchase money should be vested in *John Inman* the son in law, and *John Whitley* for the uses thereinafter mentioned agreeably to the intention of *George Inman*, clerk: it is witnessed, that for the purpose of carrying such intention into effect, and in consideration of one shilling to *George Inman*, the son, paid by *John Inman*, the son in law, and *John Whitley*, *George Inman*, the son, did direct and declare that the said sum of 1050*l.* should thenceforth be vested in the trustees, their executors, &c. upon trust, that they and the survivor, and the executors and administrators of such survivors, should apply the interest, dividends, or produce of the said sum of 1050*l.*, or so much thereof as should be necessary, in the maintenance of *George Inman*, the son, during his life, and after his decease, as to one moiety of such principal sum as *Henry Inman* should appoint, and in default thereof to the use of *Henry Inman*, his executors, administrators, and assigns, and as to the remaining moiety of *the hereditaments and premises thereby limited and appointed*, to the use of such person and persons for such estate and estates, either absolutely or conditionally, and with or without power of appointment, and in such sort, manner, and form, and subject to such powers, provisoes, conditions, and agreements as *Sarah Inman* by herself alone, and whether sole or covert should from time to time by any deed or deeds, writing or writings, to be by her signed,

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sealed, and delivered, in the presence of two or more credible witnesses, or by her last will and testament; which said last will and testament it was thereby expressed, she should have power to make, as to her should seem meet, to be by her signed and published in the presence of three or more credible witnesses, direct, limit or appoint, and in default thereof, *to the use of the said George Inman, the son, his executors, administrators, and assigns.*

The deed of 24th of *February* 1802 was executed by *George Inman*, the son, who was interested for life only in the trust fund; and neither *Henry Inman* nor *Sarah Inman* is mentioned as a party thereto, although that deed purports to give *George Inman, the son*, a contingent reversionary interest in the moiety of the trust fund, to which *Sarah Inman* was absolutely entitled, unrestricted by any such power of appointment. *Sarah Inman* died in the lifetime of her husband, but previously to her death, signed an instrument, purporting to be a testamentary appointment, made the 3d of *September* 1807, in pursuance of the power so expressed to be given to her in the indenture of release of 24th of *March* 1802; in which instrument it is expressed that *Sarah Inman* appointed the interest and produce or dividends arising from all such money or principal sum, over which she had a disposing power, unto her husband for his life, with remainder to her nephew, *John Inman*, of *Minehead*, and in which instrument it was also expressed that *Sarah Inman* appointed her said husband executor of her said will.

John Inman, the son in law, survived his wife *Sarah Inman*, and died in 1813, in the lifetime of *John Whitley*, having previously made his last will, bearing date the 11th of *April* 1812, and appointed *James Tucker* and the said *John Whitley* his executors, who proved the will in the Prerogative Court of *Canterbury*.

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John Whitley died in *December* 1831. *James Tucker* died in *April* 1834, having previously made his last will and codicil thereto, and appointed the above-named *William Tucker*, *John Inman Tucker*, and *John James*, his executors, who duly proved the same in the Consistorial Episcopal Court of *Wells*, on the 3d of *June* 1834, and thereby became the legal personal representatives of *John Inman*, the son in law. *George Inman*, the son, died in *August* 1838, after which the deponent *William Tucker* obtained a commission out of the Prerogative Court of *Canterbury* for the purpose of being duly sworn to administer, in order to obtain letters of administration of the goods, chattels, and effects of *Sarah Inman*, for the purpose of administering the same under the will of her husband. Before this commission was executed, *William Southgate Inman*, and *A. Victoria Little*, wife of *Robert John Little*, son and daughter of *Henry Inman*, caused a citation to issue out of the Prerogative Court to the personal representatives of *John Inman*, the son in law, requiring them to appear in the Prerogative Court by a day therein mentioned, and leave in the registry of the said court the original will of *Sarah Inman*, and to shew cause why letters of administration, with the said will annexed, of the goods, chattels, and credits of *Sarah Inman*, should not be granted to the said *William Southgate Inman*, *A. Victoria Little*, they alleging that they had purchased, *April* 1819, from *John Inman*, the nephew, the reversionary interest in the said trust fund so bequeathed *John Inman*, the nephew, in and by the will of *Sarah Inman*.

In answer to this rule, an affidavit was made by the attorney of *William Southgate Inman* and *A. Victoria Little*, which stated as follows.

A decree or order of the Prerogative Court was served before the 8th of *January* 1840 on *William*

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Tucker, *John Inman Tucker*, and *John James*, to bring into the said court, or before the proper officer thereof, the above-mentioned will of *Sarah Inman*. On the 24th of *January*, being the second session of the said court in *Hilary* term, a proctor appeared for them, and was assigned to bring in a proxy according to the rules and practice of the said court, authorising him to appear and act for them. On the 1st of *February*, being the third session of the said court in the said term, the said proctor exhibited a proxy accordingly, and was assigned to bring in an affidavit of script, or statement, of the testamentary papers of the deceased. On the 13th of *February*, being the fourth session, the said proctor exhibited a special proxy under the hands and seals of *W. Tucker*, *J. I. Tucker*, and *J. James*, and made himself a party for them in the cause or proceedings instituted in the said court against them, by or on behalf of the said *W. S. Inman* and *A. V. Little*, for proving the will or obtaining letters of administration, with such will annexed, of the goods, chattels, and credits of *Sarah Inman*; and the said proctor did then, on behalf of his clients, make and put in divers allegations relating to the said will, and the power of appointment and right of the said testatrix to make the same, and did deny the validity of the said will or appointment, and pray that letters of administration of the goods, chattels, and credits of *Sarah Inman* might be granted to his parties, and claimed that they were entitled thereto as executors of *John Inman*, who was the husband of *Sarah Inman*, and survived her. The proctor of the said *W. S. Inman* and *A. V. Little* having replied to the said allegations and claims of *W. Tucker*, *J. I. Tucker*, and *J. James*, the proctor of the said last-mentioned parties did, on the 1st of *May*, bring in a rejoinder, together with an affidavit of *W. Tucker*, in support of his case. The act or pleadings of all the parties being thus com-

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pleted, *Saturday*, the 9th day of *May*, was assigned by the court for the hearing of the cause and pronouncing sentence.

After the death of *George Inman*, in 1838, it was discovered by *J. James*, acting as solicitor for the representative of *J. Whitley*, that the indenture of the 24th of *February* 1802 had not been executed by *John Inman*, the son in law, whereupon *J. James* contended that the power given to *Sarah Inman* of appointing by will was not duly created, and that the will or testamentary appointment made by her was invalid. On the part of *W. S. Inman* and *A. V. Little* it is contended, in the affidavit, that the said will or appointment is valid and effectual for that use, even if the deed was not executed by *John Inman* the son in law, yet that he sufficiently assented thereto by accepting and availing himself of the same, as the affidavit states it is believed that he did, by dividing and appropriating the surplusage interest and dividends of the trust fund subject thereto, and by divers other acts and means, and that thereby and by reason of other circumstances relating to the said trusts and conveyances, a trust for the separate use of *Sarah Inman*, enforcible in equity, had been well created. And (the affidavit states) it is intended, and preparations have been made on behalf of *W. S. Inman* and *A. V. Little*, to institute a suit in chancery for adjudicating on the effect of the indentures and circumstances, and the validity and effect of the said will or appointment, and the separate trust created in favour of *Sarah Inman*, and it is believed that before such suit can be duly prosecuted it is necessary that the personal representative of *Sarah Inman* should be created by letters of administration granted by a proper ecclesiastical court, and that before any adjudication can be obtained in Chancery upon the said will or testamentary appointment, the same must be proved or

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›lished in a proper ecclesiastical court; but that such mentioned proof cannot conclude, or in any wise :rially affect, the decision of the court of Chancery › the effect or validity thereof, although if such will ppointment should not be allowed to be so proved, court of chancery would be precluded from adjudi- ng thereon. *W. S. Inman* and *A. V. Little* are the t of kin of *Sarah Inman*, and also two of the resi- ry legatees of *John Inman* the son in law, and in ı character claim an equal right with the said *W. ker* or *J. I. Tucker* to letters of administration of the cts of *Sarah Inman*, even if her will were to be ad- ged invalid and ineffective. Though *W. Tucker*, *J. I. ker*, and *J. James* may be the executors of *James ker*, the surviving executor of *John Inman* the son aw, yet they are not the proper legal representatives *John Inman*, the son in law, inasmuch as the will of said *John Inman*, the son in law, was proved in prerogative court, and that of *James Tucker* in the sistory court of the Bishop of *Bath* and *Wells*, as it elieved. The administration prayed for in the pre- ative court on behalf of *W. S. Inman* and *A. V. le*, is one to be limited to *Sarah Inman*'s moiety of said trust funds, and there are no other effects or perty of *Sarah Inman* to be administered. The trust fund is payable by or due from the repre- tative of *John Whitley*, and subject to the direction control of *J. James*, as the solicitor and adviser of h representative, and the successor in business to *J. itley*, and that such representative or *J. James* can- be compelled to pay over such trust funds otherwise ı by suit or proceedings in a court of equity.

n support of this application, *Manning* Serjt. re- ed to *Brook* v. *Turner* (*a*) where it was held that the

(*a*) 1 *Mod.* 211. 2 *Mod.* 170.

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spiritual court cannot try the question, whe has been given to a married woman to m pointment in the nature of a will, and that th common law will prohibit the prerogative granting probate. So in *Jenkin* v. *Whiteh Scammell* v. *Wilkinson* (*b*) prohibition was gra spiritual court, (after argument on demur declaration,) in a suit instituted to obtain pr will of a woman made during coverture, t her husband's consent, and though she su The particular grounds upon which the cour Bench interfered on that occasion have no a the facts of the present case. It is mentio as an instance of interference by prohibition court sees that the spiritual court is proce the right of a married woman to appoint by w in all the cases referred to it is not denied power of the married woman to appoint by mitted or established, the question as to the *tion* of the power is within the compete ecclesiastical tribunal.

(*a*) 1 *Burr.* 431., *post*, 534.

(*b*) 2 *East*, 552. In giving judgment the Court says (*ib.* 558.), "In this case, on the face of the proceedings, it appears that the prerogative court is applied to to grant a probate, which will give to a will made by a woman during her coverture the effect of a will made during her widowhood and discoverture. And it is not impossible but the ecclesiastical court may in this case grant such probate; for by the civil law a *feme covert* might make a will, and so she might by the canon law, *Linwood*, 173." The words of *Linwood* (*Lyndwood*) are, "Unde, cum inter personas exceptas non comprehendatur muli mirum est quod mariti nituntur u testamenti factio Habent enim pro quod uxor nulla unde testari possi ad maritum pert sine mariti licent potest condere te He then contends may bequeath, n own goods but h also, upon variou from the civil an one of the matter learned canonist i the latter propo "Et maritus vo Dominam."

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Bompas Serjt. now shewed cause upon the above mentioned affidavit made by the attorney for *William Southgate Inman* and *Anna Victoria Little*, which, in addition to the circumstances and arguments (*a*) above detailed, confirmed the statements contained in the affidavit upon which the rule *nisi* had been obtained.

Looking at the dates of the different proceedings, the application ought to have been made earlier. This rule was not obtained until the 13th of *May*, which was after all the proceedings in the ecclesiastical court had been brought to a close. The question sought to be raised by this motion is, whether the applicants are entitled to administration, or whether it ought to be granted to the parties against whom the writ is prayed. This is a question for the ecclesiastical court. This court is not the proper tribunal before which to discuss who is or who is not entitled to administration. With respect to *Brook* v. *Turner* it is submitted that the courts would not now grant a prohibition under similar circumstances. The courts of common law cannot inquire into the validity of trusts, and courts of equity cannot inquire into the validity of a trust creating a power of making the testamentary appointment until administration has been granted in the spiritual court. In *Stone* v. *Forsyth* (*b*), Lord *Mansfield* says, "It has been settled that before you can come into Chancery

(*a*) In shewing cause no notice was taken of the objection (*antè*, 527.) that *J. I. Tucker*, *W. Tucker*, and *J. James*, though executors of *James Tucker*, who was the surviving executor of *John Inman*, were not the proper legal personal representatives of *John Inman*, inasmuch as the will of *John Inman* was proved in the prerogative court of *Canterbury*, and that of *James Tucker* in the consistory court of the Bishop of *Bath* and *Wells*.

A similar objection was raised on demurrer in a case of *North*, *Administratrix*, v. *Wilder*, set down for argument in this court in *Michaelmas* Term, 1840; but the learned serjeant who was instructed to support the objection, declined to argue it.

(*b*) 2 *Dougl.* 707.

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on a title to personal property, under the will of a *feme covert*, to whom a power of making a will is reserved, such will must be proved at the Commons."

In *Jenkin* v. *Whitehouse* (*a*) Lord *Mansfield* refers to a case of *Ross* v. *Ewer*, in which the Lord Chancellor held, that though an appointment by will operates as an appointment, it must be proved in the spiritual court, and that he could not proceed until it was proved, and that the fact that the paper was her will, in case she had power to make one, must be established in the ecclesiastical court. In *Rich* v. *Cockell* (*b*) Lord *Eldon* C. says, "Where a *feme covert* had the power by will, according to the terms of the instrument requiring witnesses, to dispose of personal estate, it was necessary to prove; first, that the instrument was in nature of a will; secondly, if so, that it was attested *eo modo*, in which the power required it to be attested. For the former purpose it has been hitherto deemed necessary, that this court should be satisfied, by the judgment of the ecclesiastical court, that the instrument is in nature of a will. But this court has never been contented with that judgment, as to the circumstances of attestation; for after that proof in the ecclesiastical court, this court always requires the witnesses to be examined in order to prove that it is her act, and will not trust the ecclesiastical court with this conclusion; that because it is her act, and in nature testamentary, therefore this court is of necessity to hold it an appointment."

In *Tappenden* v. *Walsh* (*c*) an allegation was submitted to the prerogative court propounding the will of a widow made during her coverture under a bequest made to her "with power of disposing of it by any writing purporting to be, and in the nature of, her last

(*a*) 1 *Burr.* 431.; 2 *Lord Kenyon*, 161.

(*b*) 9 *Ves.* 376.

(*c*) 1 *Phillim.* 352.

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ınd testament." The admission of this allegation ; opposed, Sir *John Nicholl* admitted the allega- and in giving judgment said, "By the law, as it s at present, a married woman who possesses ate property may dispose of it without the consent er husband. The probate of this court does not e upon the right of disposal; it decides merely on *actum* of the instrument. Perhaps if no probate granted by this court, the person to whom the erty is left might be unable to recover it." So, in *am* v. *Burchell.* (*a*) In *Scammell* v. *Wilkinson* (*b*) spiritual court was proceeding to grant a general ıte of the will of a married woman where the will nade with the assent of the husband, who had no r to give such a general assent. Here the ad- ıtration sought to be obtained by *J. S. Inman* and . *Little* is limited to the trust property, in which are interested.

anning Serjt. in support of his rule. The spiritual , by requiring *J. I. Tucker*, *W. Tucker*, and *J. James* ave in the registry of that court, the original will *rah Inman*, and to shew cause in that court, why s of administration, with the said will annexed of ffects of *Sarah Inman* should not be granted to . *Inman* and *A. V. Little*, have assumed general liction over the right of the latter parties to admi- ıtion with the alleged will annexed, which involves uestion whether the alleged power was properly ed; a question which that court has no jurisdiction , though it may inquire whether the power, when been ascertained to exist, has been properly exe- l. In *Jenkins* v. *Whitehouse* Lord *Mansfield* says, he question be, whether the wife has a power to

(*a*) 3 *Addams*, 243. (*b*) 2 *East*, 552.

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make an appointment in the nature of a will, and thereby to deprive the husband of any benefit which by law would devolve upon him in consequence of her death, that is a question proper to be considered here; and if she had no such power, this court will grant a prohibition." By the indenture of 24th *February* 1802, *George Inman*, who, from the manner in which the property left for his support is tied up, was, no doubt, a person of weak intellect, and who was, at most, tenant for life of this property, is made to deal with the interests of the parties in remainder in a manner wholly inconsistent with their vested rights, and, as it would appear, without their knowledge or consent. *Sarah Inman*, the person whose rights were chiefly sought to be varied by the provisions of 1802, not only did not execute, but was not even made a party to that deed; and though her husband is named as a party, yet it is only jointly with *Whitley*, as co-trustee with him of the property. If it had been intended to affect his rights, or those of his wife through him, he would have been made a party to the instrument in his own right also, and would have been called upon to execute the deed, which, as a nominal party to the transaction, as a naked trustee, he would not be required to do. The supposed acts of acquiescence by the disposition of the surplus rents, even if positively sworn to, would amount to nothing, inasmuch as the application of such surplus was regulated in the same manner by the antecedent arrangements which had been validly made with respect to this property. The declaration of the pretended new trusts by the indenture of 1802, is, and purports to be, the act of *George Inman* only, and the effect of this strange contrivance is, to take away from *Sarah Inman* the absolute property which she had acquired in this fund under the deed of 1795, and instead thereof to give her a power of appointment, in default of the

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rcise of which power the absolute remainder is to t in *George Inman*, who thus, having only a life in-st, carves out for himself, upon what suggestion it y be impossible now to discover, a contingent interest en from his sister's estate, without her knowledge, currence, or consent. [*Tindal* C. J. *Sarah Inman* l a power of appointment before the deed of 1802.] e had a power of appointment in respect to the land; , in the event of the land being sold and converted o money, the property in the money, subject to the interest of her brother *George*, vested in her ab-utely. It was only by the pretended arrangement of 02 that it was attempted to deprive her of the absolute perty in remainder, and to substitute a power of pointment, with remainder to *George* in the event of appointment being executed. [*Tindal* C. J. I think t the parties who deny the power of *Sarah Inman* to ke a will, should declare in prohibition. Those who ist upon the right to administration with the will nexed, will then have an opportunity of shewing t *Sarah Inman* had authority to make this will. *mpas* Serjt. A judgment upon a declaration in pro-ition, if against us, would conclude us, but would be conclusive if given in our favour.] Whoever s the formal title as administrator will be a trustee for parties who shall turn out to be equitably entitled. t if the plaintiffs in the ecclesiastical courts, in the resentative character with which they now seek to the themselves, get possession of the fund to which y claim to be also beneficially entitled, there may be fund left to distribute in the event of the court of hancery expressing a different opinion as to the rights the respective claimants. The parties on whose be-lf the present application is made, wish, therefore, at the funds should be in the hands of those who are e true legal representatives of *Sarah Inman*.

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TINDAL C. J. I have always understood that the ecclesiastical courts have no jurisdiction to decide whether a married woman has power to make a will. *Brook* v. *Turner* and *Jenkins* v. *Whitehouse* are authorities in favour of that proposition; and no case has been cited in which the contrary was determined. With respect to the sufficiency of the power in this case there appears to be so much doubt that we ought not to be called upon to decide immediately. The parties who pray for the writ must therefore declare in prohibition, and when the case comes before us again we shall be better enabled to determine whether the writ ought to go. In the mean time the rule will be enlarged.

Rule enlarged. (*a*)

(*a*) See *Taylor* v. *Rains*, 7 *Mod.* 148.; *Dunkins*'s case, *Tremaine, P. C.* 501.; *Bromhall* and *Johnson*'s case, *ib.* 502.; *Baker* v. *Baker*, *ib.* 505.

And see further as to writs of prohibition — in causes testamentary, *Marquess of Winchester*'s case, 6 *Co. Rep.* 23. *a.*; *Orphans of London*'s case, 5 *Co. Rep.* 73. *b.*; *Smallwood* v. *Brickhouse*, 2 *Mod.* 316.; — in suits respecting marriage, *Harmer* v. *Burwill*, *Vaughan*, 207. 220.; *Hicks* v. *Harris*, *Comberb.* 200.; *Collett*'s case, *T. Jones*, 213.; *Anon.* (but *S. C.*) 2 *Mod.* 315.; — in suits relating to the making of churchrates, *F. N. B.* 50 *N.*; *Jeffrey*'s case, 5 *Co. Rep.* 67 *b.*; *Hollam* v. *Kirton*, 2 *Roll. Rep.* 463.; *Anon. Poph.* 197; *Robert*'s case, *Hetley*, 63.; *Anon.* (afterwards called, *Thursfield* v. *Jones*,) 1 *Ventris*, 367.; *Whaley* v. *Lambert*, 1 *Bac. Abr.*, title *Churchwardens*, 600.; — in suits for the payment of church-rates, *Thursfield* v. *Jones*, *T. Jones*, 187.; *Watkins* v. *Seaman*, 2 *Lutw.* 1019.; *Woodward*'s case, 3 *Mod.* 211, 1 *Salk.* 164.; *Comberb*, 132.; *Dawson* v. *Wilkinson*, *C. T. Hardw.* 381, *Andrews*, 11.; *Rex* v. *Haworth*, 12 *East*, 556.; *Lanchester* v. *Thompson*, 5 *Madd.* 4.; — in suits relating to churchwardens' accounts, *Wainwright* v. *Bagshaw*, 2 *Stra.* 974.; — in suits respecting the occupation of pews, *Byerley* v. *Windus*, 5 *B. & C.* 1. 7 *D. & R.* 564.

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BT, by the assignee of a replevin bond. The declaration stated, that on 26th *August* 1838, in the of *St. Giles, Cripplegate Without*, in the city of *n*, the plaintiff distrained the goods and chattels of fendant *Farden*, for a certain sum of money then the plaintiff *Thompson* for rent: that the said goods ıattels being so distrained, the defendant *Farden* ards, and within the space of five days then next ıg, to wit, on, &c., made his plaint before Sir *Montefiore*, knight, then being one of the sheriffs said city, out of the court of hustings of the said of the taking and unjustly detaining of the said and chattels by the plaintiff, and then prayed the ir *M. M.*, knight, so then being one of the sheriffs said city, that the said goods and chattels might thwith replevied by the said Sir *M. M.*, knight, so eing, &c., and delivered to the defendant *Farden*; thereupon the said Sir *M. M.*, knight, so then , &c., according to the form of the statute in such nade and provided, did take from the defendant *n*, and from the two other defendants as two reible sureties, a bond in double the value of the goods and chattels, the value thereof having been, ıat occasion, first ascertained by the oath of a ble witness, duly sworn according to the form, &c. the defendants, on, &c., by their certain writing atory, sealed, &c. became held and firmly bound the said Sir *M. M.*, knight, so then being, &c. in aid sum of money above demanded, to be paid to said sheriff, with a condition thereunder written, if, &c. (in the usual form of the condition to a

A replevin bond may be taken and assigned by any officer who has power to grant replevins.

Held, that one of the sheriffs of *London* has such power, without his companion, and may therefore take, and assign, replevin bonds.

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replevin bond); that thereupon the said Sir *M. M.* being, &c., afterwards, on, &c., at the prayer of the defendant *Farden*, replevied and made deliverance of said goods and chattels to the defendant *Farden*, according to the duty of his said office. That although, afterwards, to wit, on the 2d day of *October* in the year aforesaid, the court of hustings for the said city was duly holden at the Guildhall of the said city, before the Right Hon. Sir *John Cowan*, bart., Lord Mayor of the said city, Sir *G. C.* knt., and Sir *M. M.* knt., sheriffs of the said city, the same being the next court of hustings for the said city, after the making of the said writing obligatory as aforesaid, yet the defendant *Farden* did not appear at the said court of hustings and prosecute his said writ with effect and without delay against the plaintiffs, according to the form and effect of the said condition, but wholly omitted and neglected so to do: That the said writing obligatory thereby became forfeited to the said Sir *M. M.*, knt., so then being, &c. That the said writing obligatory being so forfeited, the said Sir *M. M.*, knt., afterwards, and after the expiration of his said shrievalty, to wit, 18th *December*, in the year aforesaid, at the request and costs of the plaintiffs, by an indorsement on the said writing obligatory, duly assigned the same to the plaintiffs according to the form, &c., as by the said indorsement, &c.: That by means thereof, and by force of the statute, &c., an action had accrued to the plaintiffs as assignees of said Sir *M. M.*, knight, to demand and have of and from the defendants the said sum of money above demanded: That the defendants, although often requested, had not, nor had any of them, as yet paid the said sum of money or any part thereof to the said Sir *M. M.*, knight, before the said assignment, or to the plaintiff since that assignment, but had hitherto wholly refused to pay the same or any part thereof, to the said Sir *M. M.*, knt., or to

the plaintiff, and still do refuse to pay same or any part thereof to the plaintiff. Wherefore the plaintiff saith that he is injured, and hath damage, &c.

General demurrer; and joinder.

Goulburn Serjt. for the demurrer. The question is, whether a replevin bond can be taken and assigned by one sheriff of *London* in his own name. [*Tindal* C. J. Is it alleged that the other sheriff was dead?] It is not. The court of hustings held after the granting of the replevin and the taking of the replevin bond, is stated to have been held before both the sheriffs. If any circumstances had occurred to make it proper that the replevin should be granted by one sheriff only, those circumstances should have been suggested on the record, as was done in *Rex et Regina* v. *Warrington*. (*a*) Here, there is no such suggestion. It is not contended that one sheriff might not do the act, and state it as the act of both sheriffs. The case of *Rich* v. *Sir Thomas Player* (*b*) will, probably, be cited against the defendants; but in that case nothing was decided, a further day was given to bring in more precedents. The power of assigning replevin bonds is created by 11 *G.* 2. *c.* 19. *s.* 23.; but the first statute which authorises replevins, is the statute of *Marlebridge*, 52 *H.* 3. *c.* 21., which enacts that if the beast of any man be taken and wrongfully withholden, the sheriff, upon complaint made thereof to him, may deliver them without let or gainsaying of him that took the beasts, if they were taken out of liberties, and if they were taken within any liberties, and the bailiffs of the liberty will not deliver them, then the sheriff, for default of those bailiffs, shall cause them to be delivered. [*Maule* J. It is alleged in the declaration that the defendant *Farden* levied his plaint before Sir *M. Montefiore*, knight, who is there

(*a*) 1 *Salk.* 152. (*b*) *Skinner*, 104.

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stated to be only *one* of the sheriffs. I do not understand that it is contended that the course pursued on this occasion is unusual.] We say that it is usual and wrong. One sheriff might assign to one party, the other to another. [*Maule* J. The statute says, that the sheriff who granted the replevin shall assign, and that all sheriffs, and other officers having authority to grant replevins, may and shall, in every replevin of a distress for rent, take, in their own names, from the plaintiff and two responsible persons, as sureties, a bond in double the value of the goods distrained, and conditioned, &c., and that such sheriff or other officer as aforesaid, taking any such bond, shall, at the request and costs of the avowant, &c., assign such bond, &c." That shews that the bond is to be assigned by one officer.] The assignment is always executed under a power of attorney. [*Tindal* C. J. I think the whole question depends upon whether one of the two sheriffs of *London* may grant a replevin. If he may, then he is the officer who grants the replevin, within the provisions of the 11 *G.* 2. *c.* 19. *s.* 23. *Maule* J. The object of the statute was to enable the party to have a speedy remedy. Have the sheriffs one seal?]

Peacock, contrà. This question must depend upon the power to grant replevins. In *Rich* v. *Sir Thomas Player* (*a*), the plaintiff, being one of the sheriffs of *London*, surmised it on the roll, and prayed process to the other sheriff, which was granted accordingly; and, at the trial, there was no defence. It being objected, in arrest of judgment, that the *venire facias* should have been awarded to the coroners, *Saunders*, Chief Justice, said that they judicially take notice how many sheriffs are in each county, be it a county at large, or a county

(*a*) *Skinner*, 104.

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of a vill. And (Sir *George*) *Jefferies*, (recorder of *London* (*a*)) said, that if a writ issue out of this court to the sheriffs of *London*, it is *vicecomitibus;* if to the sheriff of *Middlesex*, it is *vicecomiti*. If a plaint be levied in a compter in *London*, and a *habeas corpus* is brought, it is returned by that sheriff in whose compter the party is in custody, and he only is to answer if he escape; but a further day was given to bring in more precedents. It might be said that it must be done by the lord mayor, who is judge of the court of hustings. But the bond is not taken by the judge of the court. In county courts the suitors are the judges. In cases of bail bonds the writ issues from this court directed to both sheriffs. In *Bohun*, 286., it is said that the party may come to one of the sheriffs. [*Maule* J. The plaint is brought to the same person to whom the writ would be brought.] In *Bohun*, 239., it is said, he that would replevy goods in *London* may go to the clerk of the papers belonging to one of the compters, and give in particulars and security to restore the goods, or the value, in case upon a trial it shall appear the same did not belong to him.

Goulburn Serjt. in reply. No precedent has been produced of an action for an escape brought against *one* of two sheriffs; no custom authorising the practice has been certified. (*b*) Here, the act might have been

(*a*) Afterwards Chief Justice of K. B., then Chancellor.

(*b*) As to the certifying of the customs of *London* by the mayor and sheriffs, by the mouth of the recorder, see 1 *Wms. Saund.* 67. (1.); *antè*, 39. (*a*); 21 *Vin. Abr.* 26, 27.

In *Easter* term, 9 *Edw.* 2., the mayor and sheriffs appear in the Court of King's Bench and refuse (*renuunt*) to return a writ of error, alleging *ore tenus* (which would be by the recorder), that it is against the customs of the city that errors should be corrected elsewhere than at St. *Martin's*, *Placitorum Abbreviatio*, 323. *a.*

In *H.* 18 *Edw.* 3. fo. 8. pl. 25., in a writ of error upon a writ of right, brought in the hustings of *London*, the tenants sued error before *Hill.* &c., at *St. Martin's*. The record was made by the mouth of the re-

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done by one sheriff, but it should have been the *name* of both. In *Rich* v. *Sir Thomas Player* was decided; and what is thrown out by *Saun* is contrary to *Rex et Regina* v. *Warrington*. [referred to *Wilson* v. *Hobday* (*a*), which was an the assignees of a replevin bond. The declarati that at the city of *Canterbury*, and within the ju of the mayor of that city, the plaintiff distra goods of *W. H.* for rent; and that *W. H.* r plaint to the mayor, &c., and prayed delivera whereupon the mayor took from *W. H.* and th ant and another, a bond, condition for the ap of *W. H.* before the mayor or his deputy, at court of record, &c., and thereupon the m plevied, &c. It was held, that it was no g special demurrer that the declaration did not custom for the mayor of *Canterbury* to grant and take replevin bonds. *Erskine* J. The ma have power by charter to hold pleas.] The *Canterbury* did the act in court. [*Maule* J. Lo *borough* says, We will assume that there is a unless the contrary be shewn.]

TINDAL C. J. Nothing has been shewn to the validity of the bond. In the early part history, great inconvenience was sustained by t mon people by frequent distresses. The exis this evil is proved by the statute of *Marlebridg* which, the only remedy for a vexatious distress

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corder, by the usage, &c., which record was entered.

At a later period it was said that where a writ of error is sued in *London*, upon error before the mayor, it shall be sued at *St. Martin's*, and then the mayor and aldermen shall have day, by forty be advised of their r then the recorder sh it, *ore tenus*. *P.* 3 fo. 42. pl. 14.; 1 title *Error*, pl. 18.

(*a*) 4 *M. & S.* 120. *infrà*, 544.

expensive process of *replegiari facias*. (*a*) That statute, for the purpose of providing *festinum remedium*, enacts, that if the beasts of any man be taken and wrongfully

(*a*) Though the statute of *Marlbridge* speaks only of replevin of cattle (*averia*), it has been held to apply to all chattels.

Several kinds of replevin which this statute does not reach, were left to the operation of the writ of *replegiari facias*. Not only chattels, but men, lands, and incorporeal hereditaments were anciently the subjects of this writ. In respect of men, the process was usually called a writ *de homine replegiando*, which has been abandoned for the writ of *corpus cum causa*, latterly styled a writ of *habeas corpus*. Replevins of lands and of franchises fell into disuse when seizures of land and of franchises, without a previous legal decision on the right, ceased to be practised.

A curious instance of replevying a franchise occurred in a suit commenced in the parliament held at *Clypston, a die Sancti Michaelis in unum mensem*, 18 *Edw.* 1. *Bogo de Knowell*, the King's bailiff of his castle of *Montgomery*, complained that a certain man of the King (the King's tenant), killed a man (tenant) of the bishop of *Hereford*, for which felony the said king's man fled into the land of *Edmund de Mortimer* (*de Mortuo Mari*), of *Wygmor*, where for a certain trespass charged upon him, he was taken and imprisoned, and the said *Edmund*, although often requested by the said *Bogo* and his officers to deliver to them the said felon in the name of the king, at the king's prison of *Montgomery*, to stand there to justice in the king's court, refused to deliver the said felon, and afterwards, in his court of *Wigmor'*, at the suit of the kinsmen [*parentum*] of the said slain, caused the said felon to be hanged by the judgment of his court, to the damage [*in lesionem*] of the liberty of the king's castle of *Montgomery*, and against his crown and dignity, &c.

And *Edmund* comes and cannot deny but that he and his bailiffs did that fact as it is charged against them, and altogether puts himself in the will and grace of the lord the king.

And because the said *Edmund* cannot deny but that he judged the said felon in his court of *Wygmore*, to the damage of the said liberty of the lord the king, and against his crown and dignity, and so by reason of that judgment has altogether forfeited his liberty of *Wygmore;* nevertheless of the king's special grace, it is granted by the king that the said *Edmund*, by reason of the said trespass, do not lose his said liberty; and by the said king and his council it is considered that the said *Edmund* for that trespass be amerced in one hundred marks, and that the said *Edmund*, in token of the restitution of the king's liberty aforesaid, render to the said *Bogo* a certain effigy of a man (*quandam formam hominis*) in the name and place of the

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m's Privilegia Londini is a work of some autho-
nd in page 311. we find it stated that the two
i of *London* do each of them keep a court of
, where they hold plea of all personal actions.
dds to the judicial authority of the case in *Skin-*
The statute 11 *G.* 2. *c.* 19. *s.* 23. is not confined
iffs, but extends to all officers having authority to
eplevins. The practice in *London* has been for
eriff to grant replevins; and as no authority
g the existence of a contrary practice has been
t appears to me that the bond has been well as-

TMAN J. It is singular that in such a case so
uthority can be found. It is said that *ex vi ter-*
the sheriff," in the statute of *Marlebridge*, must
n to mean both sheriffs in cases where there are
The object of that statute was to facilitate the
, and I think that we shall best fall in with the
on by holding that either sheriff may grant re-
. *Rex et Regina* v. *Warrington*, as well as *Rich*
Thomas Player, were cases of writs, which are
directed to both sheriffs jointly.

KINE J. I am also of opinion that the plaintiff is
l to judgment. By the 11 *G.* 2., power to take
assign replevin bonds is given to the officer who
the replevin. The question, therefore, is, whe-
e sheriff has power to grant replevins. By the
of *Marlebridge* the power is given to "the sheriff."
ir *Moses Montefiore* satisfy the term "the she-
The sheriffs of *London* do not form one officer,
Middlesex. There is nothing, therefore, in the
the sheriff," which should render the concur-
of both necessary. Are we to assume that the
ee applied to the wrong person? It must, I

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think, be taken, *primâ facie*, that the distrainee applie to the right person. No authority has been cited t shew that one of the sheriffs of *London* has no power t grant replevins. The circumstance that the two sheri hold separate courts and have separate compters, material to shew that they are distinct officers.

MAULE J. I am also of opinion that plaintiff is e titled to judgment. The statute of *Marlebridge* expres gives power to sheriffs, and, by implication, to t bailiffs of liberties, to make deliverance of beasts tak and wrongfully withholden, to the owner. I assume th bailiffs might have made such deliverance by wr This shews that persons other than sheriffs might ha the power of granting replevins.

In *London* there are two officers each of whom called sheriff. The words of the statute of *Marlebrid* are therefore satisfied. The policy of that statute w that the distrainee should have back his beasts wit out delay, upon giving sufficient security. That statu is followed by 1 & 2 *Phil.* & *Mar. c.* 12. the provisio of which statute were not extended to cities, probab because in most cities there were two sheriffs. T 11 *G.* 2. *c.* 19. *s.* 23. enacts, that all sheriffs and oth officers having authority to grant replevins, may a shall in every replevin of a distress for rent, take their own name a bond, &c. and that such sheriff other officer taking any such bond, shall assign su bond. The provision respecting assignment assumes th one officer may assign. In *London*, the sheriffs are tw officers. Probably the city was granted to the sheriffs two officers. (*a*)

(*a*) The shrievalty of *London*, and also the shrievalty of *Middlesex*, are granted to the corporation of *London*; and the two persons elected by the freemen of *London* (or, an 11 *G.* 1. *c.* 18., by those fre men who are liverymen of o of the city companies) to t office of sheriff, represent t

The case of *Wilson* v. *Hobday* (*a*) has a material bearing upon this subject, though not decidedly in point. The present case falls within the reasoning of Lord *Ellenborough*, who there says, "The owner of the goods by his own application, and by the instrumentality of this defendant, and the other surety, has had all the benefit which could have resulted to him from a valid replevin. They, by

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corporation in the performance of their functions, and the corporation is responsible for their acts. (*M.* 11 *E.* 2. *Fitz. Abr. Dette*, pl. 172.) In the case of the death of either, the office of sheriff of *Middlesex* is suspended. Whether the shrievalty of *London* is also in suspense, is said by the Commissioners on Municipal Corporations in *England* and *Wales*, in their Report on *London* and *Southwark*, 37., to be doubted.

In the city of *London* the judicial functions are performed by the judges of the two courts of the sheriffs. These officers, who were formerly called the under-sheriffs, or the sheriffs' first clerks, preside over the courts of the two sheriffs, one of which courts is for the *Poultry* Compter, the other for the *Giltspur Street* Compter. It is considered, in the above Report, as *one court* holden separately at different places before the two sheriffs; and, consistently with this principle, its style is "The Sheriffs' Court, holden for the *Poultry* Compter *London;*" or, "The Sheriffs' Court, holden for the *Giltspur Street* Compter, *London.*" It has been the invariable practice to consider the *Poultry* Compter as belonging to the senior sheriff, and the *Giltspur Street* Compter to the junior sheriff; and the process in each division accordingly issues in the name of the sheriff to whom that division is assigned. Each judge may try causes in either court, though each is nominally appointed to a particular court. (*Report*, 86. 129.)

Most of the ministerial functions of the sheriffs in the city are performed by the sheriffs' second clerks, commonly called the secondaries of *London*. Upon these officers fall the execution of writs directed to the sheriffs of *London*, the summoning of juries, and generally the ordinary functions of an under-sheriff in counties. They have the direction of the serjeants-at-mace and their yeomen; but they are said (*Report*, 86.) not to admit that they are responsible for the acts of these functionaries.

In *Middlesex* the ordinary functions of sheriffs, both judicial and ministerial, are performed by the under-sheriff of *Middlesex*, acting under a joint appointment from the two persons exercising the office of sheriff of *Middlesex*.

(*a*) 4 *M.* & *S.* 120.

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their acts, have assumed that the mayor (*a*) proper person to grant the replevin, and the fact as alleged procured a replevin from him, reasonable that they should now desire the Co sume that the replevin was improperly and u ably granted, or that they (without bringing fo thing on their part affirmatively to impeach i complain that the plaintiffs have not aver particular necessary to render it valid? consid it was brought about at the instance and app the owner and his sureties, and that they ha from it all the benefit which they could have c the most valid replevin, we are of opinion tl bound, as against this defendant, to consider *facie* as valid." "That other inferior courts a prescriptive right to hold plea of replevin though hundred courts cannot, is admitted by in *Carthew*, 382. (*b*), and is evident from

(*a*) It appears from 5 *Rot. Parl.* 188. *b.*, 222. *b.*, that long after the statute of *Marlebridge*, *Canterbury* was governed by two bailiffs, for whom a mayor was substituted by *Henry* VI.

(*b*) "This prescription for a steward of an hundred court to grant precepts of replevin *out of a court*, upon a parol complaint made to him, is a void prescription, and against law; for even the steward himself hath no such power by the common law, but his authority in that matter is given to him by the statutes of *Marlebridge*, *c.* 21., and *Westm.* 1. *c.* 17., and those statutes do not extend to any other person but the sheriff only (*Co. Litt.* 145. b.; 2 *Inst.* 139, 140.); and if the sheriff, who is steward of the county court (see *Tinsley* v. *Nassau*, 2 *C. & P.* 582.; *M* 52.; *Tunno* v. *Mo* *Mees & Rosc.*, 298 *P. C.* 224.; 1 *Gale* no such power at co it follows that the an hundred court, w rived out of the co cannot have any suc to grant replevins o

But it was agree hundred court, and of lords of manors prescription, hold pl vin, and so may have power to reple cattle taken; but th by process of the c plaint entered, but parol complaint out (*Longo Quinto*, 34.

Nota. — All plai vin in any inferior c hold plea therein b

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Brev. 70 B., where it is said, 'and if a replevy be sued by plaint in the court of any other lord than in the county court before the sheriff, then the *recordari* which is sued by the plaintiff or defendant, shall be directed unto the sheriff, and the writ shall be such, &c.'" "As the mayor of *Canterbury* might, by legal possibility (*a*), have had full power to do all he did, we think we are not at liberty, upon the facts stated, to presume in favour of this defendant that he had not." Here, the distrainee, or a person in privity with him, went to the sheriff, and a bond was taken, upon the authority of the

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tion, must be in the detinet only, because the goods, &c. are not replevied but by process subsequent to, and grounded on, the plaint. (*Co. Ent.* 294.*a*; *Dyer*, 245, 246.; *F N. B.* 73.)

To a declaration in case for distraining plaintiff's cattle on a farm for rent due to *D.*, for selling the cattle after a replevin was granted by the sheriff, and for paying the proceeds to *D.*, it is a good plea that from time immemorial the farm has been parcel of the manor of *F.* and *F.*, parcel of the honor and lordship of *C.* of which *E.* is the lord; and that, from time immemorial, *E.* and all whose estate, &c. have had cognisance of pleas and plaints in replevin, in the courts of the manors of the honor and lordship, to be holden from three weeks to three weeks, by plaints to be there instituted, and have replevied and granted deliverance of cattle, &c. as the sheriff might in his county before the statute of *Marlebridge*; and that no sheriff, &c. might enter the honor, except in default of the bailiffs; that such court baron of the lord of the manor of *F.* has been from time immemorial holden from three weeks to three weeks; that *E.* made no default in replevying or granting deliverance of the cattle; that the sheriff, before he replevied, did not require *E.* to replevy or grant deliverance; and that none but the sheriff replevied or granted deliverance; although the plea do not allege that the cattle were impounded within the franchise; 1 *N.* & *P.* 763.; (*Mounsey* v. *Dawson*, 6 *Ad.* & *Ell.* 752.) In an action for selling goods which have been replevied, contrary to the statute of *Marlebridge*, the declaration ought to allege notice to the lord of the franchise or his officer, and default made by the lord or officer in delivering the cattle; and *semble*, that the default should be an actual one, and not merely the delay arising from the ordinary course of proceeding in the lord's court. *Ib.*

(*a*) He was the successor of the two *bailiffs* of *Canterbury*. *Vide suprà*, 544. 546.(*a*); *Bennet* v. *Wells*, 2 *Keble*, 573.

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defendant, that the sheriff is the proper person to *take* the bond. The declaration in *Wilson* v. *Hobday* (*a*) simply stated that the owner of the goods made complaint before the mayor of *Canterbury*; and Lord *Ellenborough*, citing *F. N. B.* 129., which is a very high authority, says that as he might have such power he would assume that he had it. Here, the allegation is, that the distrainee made his plaint before Sir *M. Montefiore* Knight, then being one of the sheriffs of the city of *London*, out of the Court of Hustings of the said city. Inasmuch as it is legally possible that the sheriff may have power to grant replevins, it ought to be presumed against the defendants.

Judgment for the plaintiff. (*b*)

(*a*) 4 *M.* & *S.* 120.

(*b*) A *pluries replegiari*, issued out of Chancery, returnable in the Bench this term, at the suit of one *Hurst*, citizen of *Exeter*, for certain goods and chattels taken in *London* by *Mallorie*, knt., late mayor of *London*, and others, and the writ was returned by the sheriffs of *London*, and the effect thereof was, "that the custom within the same city from time whereof, &c. was such quod quandocunque aliqua bona vel catalla per legem terræ replegiabilia, ibidem capta fuerunt, quod tunc ea debent et consueverunt replegiari tantummodo per ministro *vicecomitum* civitatis pro tempore existentium, virtute querelæ in curiâ dominæ reginæ et progenitorum suorum *coram vicecomitibus* ejusdem civitatis levatæ, et non per breve regium extra curiam cancellariæ emanans; that the custom was ratified and confirmed, amongst others, by authority of parliament 5 *Edw.* 3., and also that they were bound by their oath to observe the customs, &c. without violation, wherefore they cannot nor ought to make execution of the writ," &c.; and, by the opinion of the judges of both benches, this return is insufficient, and another writ of *pluries replevin* was awarded to the new sheriffs, and process of contempt to attach the late sheriffs, &c. (*Hurst* v. *Mallorie*, *Dyer*, 245. *b.*)

The practice in *London* upon a *writ* of replevin was not stated in the argument in *Thompson* v. *Farden*. That writ would be directed to both sheriffs, and, it would seem, that though actually executed by one sheriff, the return must be *replegiari fecimus*. It is probable that before the statute of *Marlebridge*, the act of replevying would be considered, like the execution of other writs, the joint act of both sheriffs, and the words of that statute do not appear to mani-

fest any intention to alter that practice. A contrary custom may have since sprung up, and the separation, which appears to have always existed with reference to the judicial functions of the sheriffs may have been extended to this branch of their functions, which are partly judicial and partly ministerial. If it should be objected that a custom, which must have arisen long after the reign of *Richard* I., would not be a legal custom, it may be said that the practice of measuring legal memory by reference to a period of the limitation of writs of right, was not fully established at the early period at which this custom took its rise. Thus, it was held to be a good usage in the county of *Northampton*, for the frankpledges to grant replevins in the absence of the bailiff (*M.* 30. *E.* 3. fo. 23.), which Lord *Coke* translates "the *sheriff*'s baily" (2 *Inst.* 139.), a custom which, supposing the power of bailiffs to grant replevins without a writ and mandate, to have been indirectly created in 1256 by the statute of *Marlebridge*, must have had its commencement long after the accession of *Richard* I. in 1189.

In *Bohun*, 236., writ and plaint appear to be placed on the same footing.

In 1347 complaint was made to the king and his council, by *Thomas Gervays*, of *Wycombe*, that a cerpler of wool, of the price of 10*l.*, in the city of *London*, in the ward of *Queenhith*, in a house which *Anthony Citron* had hired, was on such a day taken by *William Kere*, &c. under-taxers of the fifteenth, out of the said house to the guildhall of the said city, surmising that *Citron* was taxed to the fifteenth for that year in 40*s.*, and that the cerpler belonged to *Citron*; whereas *Citron* had no chattel within the city, and had not resided there for three years before the granting of the tax; upon which carrying away of the cerpler, *Gervays freshly sued to John de Gloucestre, then sheriff of the said city, to have deliverance thereof*; and also to *William de Morden* and *Richard de Keselingbury*, chief taxers of the fifteenth, and also to *Kere*, &c. under-taxers, who took the cerpler; and offered by good and lawful men, citizens of the said city, to make proof that the cerpler was his own proper chattel on the day it was taken, and not the property of *Citron* or of any other, but could not be received by them to prove this. Whereupon *Gervays* sued to the mayor and recorder and aldermen of the city, praying that he might have right and be admitted to proof of his chattel. Whereupon the mayor and aldermen were of opinion that he should have his proof, and commanded *John de Gloucestre*, then sheriff, to warn *Kere*, &c. against *Monday*, &c. to shew cause why *Gervays* should not be received to make proof of his chattel. On which day *Gervays* came before the mayor, recorder, and aldermen, and *Kere* and his companions were warned and came not; whereupon *Gervays* was received and duly made his proof before the mayor, recorder, and aldermen. Notwithstanding which proof *Kere*, &c. by the assent and aid of

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Keselingbury, chief taxer, took and carried away the cerpler from the guildhall, and still detained it, whereupon *Gervays* made his suit by petition before the mayor and aldermen in hustings, to do him right and reason, whereof he had no remedy, and also against the said *Kere* and his companions, under-taxers in the king's Exchequer, as against ministers. In which suit Sir *Alayn de Asch'*, baron of the Exchequer, has been twice to *St. Martin's* upon *nisi prius* granted; but through menaces there was none of the country so bold as to come at the said days, and *Gervays* is threatened to be put to death by *Kere* and his companions unless he abandon his suit against them. Whereupon *Gervays* sued a writ of menace, and also a *replegiari sicut alias* and *sicut pluries*; but by no suit in law can he come to have his chattel nor remedy for the tort which is done him to his damage of 40*l.*, whereof he prays our Lord the King and his council remedy, and that it please the council to call before them the recorder, *Henry Darcy*, *John Hamond*, *John Gubbe*, *Richard de Lacer*, who then was mayor, and other aldermen, who know the truth of the said business.

ANSWER. Let the mayor of *London* be commanded, that if the plaintiff sue his process and the taking of the inquest, the mayor give him aid and defence upon the prosecution of his said process, that he may freely prosecute his said process; so that it is not proper that the king should give any other remedy. 2 *Rot. Parl.* 186. *a*, *b*.

And see *Holler* v. *Bush*, 1 *Salk.* 394.; *Halet* v. *Burt*, 2 *Salk.* 580., 1 *Lord Raym.* 218., *Skinn.* 674., 5 *Mod.* 252., *Carthew*, 380., 12 *Mod*, 120., 21 *Vin. Abr.* 65, pl. 12.; *Wilson* v. *Dry*, 7 *Dowl. P. C.* 461.; 6 *N. & M.* 617. *n.*

HARRISON *v.* FANE.

Upon a replication of necessaries to a plea of infancy in an action for the hire of horses,

DEBT. The plaintiff in his declaration demanded 20*l.* for the use and hire of certain horses, &c. and of divers saddles, &c. by the plaintiff let to hire to the defendant at his request, and 20*l.* for money saddles, and harness, the question whether necessaries or not necessaries, is a question of fact for the jury. But where, upon such an issue, it appeared that the defendant was an *Oxford* student, and the plaintiff gave no evidence that the horses, &c. were necessaries, except that the defendant himself kept a horse, and occasionally hunted with his father, a man of property who keeps hounds, and the judge told the jury that he was of opinion that the plaintiff was not entitled to recover, the court set aside a verdict for the plaintiff, and granted a new trial with costs, considering the verdict, which was for less than 20*l.*, to be perverse.

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: due from the defendant to the plaintiff, on an ıted between them.

st. *Nunquam indebitatus.* 2dly. Infancy at the making of the alleged contract. Replication: plea, *similiter* (*a*); to the second plea, so far ; relates to the debt and causes of action in ount, and the damages for the detention *ecludi non*, because the said use and hire horses, &c. and divers saddles, &c. in that tioned to have been let to hire by the plaintiff ndant, were at the time of so letting to hire, aries, suitable to the then degree, estate, and f the defendant: Verification. To the second as the same relates to the debt and causes of ıe second count mentioned, the plaintiff saith ll not further prosecute his suit against the in respect of the said last-mentioned debt, and ıction or any part thereof. (*b*) Therefore as -mentioned debt, and causes of action, let the be acquitted thereof, &c. Rejoinder, *actio non*,

unquam indebitatus l to both counts, apparent inconsis- ling the *similiter* to that plea, thereby ı readiness to sub- ry the truth of the t, and at the same ng a *nolle prosequi* ount.

ıfant cannot state an *Trueman* v. *Hurst*, ., except before au- inted in a court of *Newton*, Serjeant, *M.* 10 *H.* 6, fo. 14, t this could only be infant was plaintiff, of account does not ın infant (*Co. Litt.* ın though the items consist of necessaries. (*Bartlett* v. *Emery*, 1 *T. R.* 42. *n*; *Ingledew* v. *Douglas*, 2 *Stark. N. P. C.* 36.; *Hedgeley* v. *Holt*, 4 *C.* & *P.* 104.) Yet it has been held that an infant may bind himself by single bill, *i. e.* a bond without a penalty, to pay for necessaries (*Cupworth's* case, 1 *Roll. Abr.* 729.; *Russel* v. *Lee*, 1 *Lev.* 86.; *contrá*, *H.* 21 *H.* 6, fo. 31, pl. 18. *per Paston* J.; and see *P.* 18 *E.* 4, fo. 2. pl. 7. *per Brian*, C. J., and *Littleton* J.; *Monnings* v. *Knopp*, 1 *Roll. Abr.* 18. pl. 2.; *Cro. El.* 700.; 1 *Vin. Abr.* 301.; *Ayliff* v. *Archdale*, *Cro. El.* 920.; *Plowd.* 364. *b*; 9 *Vin. Abr.* 380.; *Co. Litt.* 172. *a*; 1 *Tho. Co. Litt.* 175.

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because the said use and hire, &c. were not necessaries, suitable, &c.

At the trial before *Williams* J., at the last Summer assizes for the county of *Oxford*, the following facts appeared. The defendant, a student in the university, a younger son of *John Fane* esquire, a gentleman of fortune, who in several parliaments was one of the representatives for the county of *Oxford*, having a family of five children, hired from the defendant, a livery-stable keeper at *Oxford*, horses, saddles, harness, &c. and also gigs, which though mentioned in the particulars of demand, were not included in the declaration. The whole sum claimed, including the hire of gigs, was 12*l.* 7*s.* The defendant kept a horse of his own and hunted with his father's hounds.

Talfourd Serjt., for the defendant, applied for a nonsuit, on the ground that the horses, &c. were not necessaries for a person circumstanced as the defendant was at the time of the hiring.

Ludlow Serjt., for the plaintiff, urged that the question of necessaries was a question for the jury.

The learned judge was of opinion, that the question was a mixed one of law and of fact, and therefore he could not nonsuit. His lordship told the jury that the hiring and use of horses and gigs were not necessary for a person circumstanced as the defendant, and that he was of opinion that the plaintiff was not entitled to recover. The jury, however, returned a verdict for the plaintiff for 12*l.* 7*s.*, being the full amount of the particulars of his demand.

In *Michaelmas* term last, *Talfourd* Serjt. obtained a rule *nisi* for a new trial, on the ground of this being a perverse verdict; against which,

Ludlow Serjt. now shewed cause. If the jury are *bound* to act upon the judge's opinion, it would avoid

circuity, to allow the judge at once to enter the verdict as he thought right. But it is submitted that the question was a question of fact, proper to be left to the jury. And this was the view of the matter taken by the learned judge himself when he refused to nonsuit the plaintiff. The jury had before them evidence from which they might fairly come to the conclusion that the horses were necessaries for defendant in the station which he occupied, his father keeping hounds, and the defendant and his father hunting together. [*Tindal* C. J. This action is not brought against the father.]

Talfourd Serjt. in support of his rule. What are necessaries for an infant depends upon the situation of the individual, which is a fact to be inquired into by the jury; but that fact being ascertained, the jury are bound to attend to the opinion of the judge as to what should be considered necessaries for a party so circumstanced: *Peters* v. *Fleming*. (*a*)

TINDAL C. J. The affirmative of the issue in this case lies upon the plaintiff, and the question is, whether, upon the evidence, the proposition which plaintiff had undertaken to establish was made out. It was a question of fact for the jury, subject to the control of the court, as to the manner in which the jury have exercised their discretion. The question of necessaries may arise upon matters connected with the real estate of the infant. How can the jury say whether a fine upon an admission to copyhold land is necessary for the infant? (*b*)

I do not say that horses and gigs are not necessaries under any circumstances; but no evidence was given

(*a*) 6 *M.* & *W.* 42.

(*b*) *Vide Evelyn* v. *Chichester*, 3 *Burr.* 1717.

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that they were so in the present case. All that was shewn was, that defendant kept a horse, and sometimes hunted with his father.

COLTMAN J. No man can be more averse than I am to disturb the verdict of a jury; but there are cases in which juries are apt to overleap the law for the purpose of doing what they consider to be substantial justice.

ERSKINE J. The object of the court in sending a case to a new trial is not to deprive a jury of their proper jurisdiction, but to confine them within the limits of that jurisdiction.

MAULE J. The plaintiff altogether failed in making out that the horses which he had let to defendant were necessaries. I doubt whether the jury thought they were so: they were probably of opinion that an improper defence had been set up.

Ludlow Serjt. The verdict being under 20*l.*, the defendant cannot have a new trial unless the court is satisfied that this was a *perverse* verdict.

Per Curiam. The verdict was perverse, and the defendant is therefore entitled to a new trial without payment of costs: in such a case the rule as to 20*l.* does not apply.

Rule absolute. (*a*)

(*a*) And see *Burghardt* v. *Angerstein*, 1 *Mood. & Rob.* 258., and 6 *C. & P.* 690.; *Charters* v. *Baynton*, 7 *C. & P.* 52.; *Mortara* v. *Hall*, 6 *Simon.* 465.

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Serjt. moved for judgment as in case of a non- and also to rescind the rule which had been ced by the court on the 12th of *May* last, upon the Master's report, that he was of that where the rule for judgment as in case of it, is discharged on the plaintiff's agreeing to eremptory undertaking to go to trial, and the discharging that rule is not drawn up until the ime for doing so has expired, the second rule ered as abandoned. This motion was founded affidavit, stating that inquiries had been made erks in the rule offices of the courts of Queen's nd Exchequer of Pleas, as to the practice with o the service of such discharged rules; and that tice of those courts was stated by such clerks to known and constantly acted upon, and that it t require the defendant to draw up and serve e on the plaintiff previously to the plaintiff's default in not proceeding to trial pursuant to ptory undertaking; and that the course ob- y the defendant with respect to the moving for ining the rule for judgment as in case of a non- iout serving a copy of the discharged rule upon itiff, was perfectly regular; and that the opinion d by the clerks of the said rule offices were d by those of two chief clerks in the rule office ourt.

The court will not open a rule upon a suggestion by affidavit, that the report of the Master, upon which the court had acted in disposing of the rule, was erroneous.

Where both parties had become insolvent since action brought, the court intimated that they would discharge a rule *nisi* for judgment as in case of a nonsuit, unless the defendant would consent to a *stet processus*.

AL C. J. This should have been mentioned n the discussion of the former rule. We can- such a rule discussed a second time. The

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practice as certified by our officer appears to be reasonable.

Rule *nisi* for judgment as in case of a nonsuit granted.

Rule to rescind the former rule (*a*) refused.

Bompas Serjt. now shewed cause upon an affidavit stating that in *January* last, a fiat in bankruptcy issued against the plaintiff under which he had obtained his certificate, which was allowed by the Court of Review on the 4th of *April* last; and that on the 11th of *April* last, the defendant presented a petition to the Insolvent Debtors' Court, praying for his discharge, — that from the schedule filed in the latter court, it appears that the defendant's debts amount to 1400*l.*, and that he has no assets. The affidavit went on to state that application had been made at the rule offices in the Queen's Bench and Exchequer, and that the officers had declined having made the statements mentioned in the affidavit filed on the part of the defendant, and asserted that the practice was that contended for by the plaintiff.

Per Curiam. The rule must be discharged, unless the defendant will consent to a *stet processus.*

Rule absolute, by consent, for a *stet processus.*

(*a*) *Anté*, p. 50.

WILKINSON *v.* BRITTON.

TALFOURD Serjt. obtained a rule *nisi* to set aside a judgment by *nil dicit*, signed on the 26th of *May*, for irregularity with costs. The rule to plead expired on the 25th, but as the Queen's birthday, the 24th of *May*, fell this year on *Sunday*, it was kept on the following *Monday*, on which day the offices were closed.

Where a rule to plead expires on a *Monday*, on which day the offices are, in fact, closed, because the *Sunday* preceding was the Queen's birthday, the *Monday* is not excluded from the computation of time, and the defendant is bound to plead before the opening of the office on *Tuesday*.

Channell Serjt. now shewed cause. It will be contended for the defendant that he was entitled to the whole of *Monday*, the 25th of *May*, that day being kept as a holiday at the offices, and that he had till eleven o'clock of *Tuesday*, the 26th, to plead. It is submitted that the day on which the birthday of the sovereign happens to be kept not being the actual birthday, does not come within any statute or rule of court which excludes public holidays from the computation of time for pleading.

Talfourd Serjt. in support of the rule. The 25th *May* was a *dies non*. By *R. H.* 2. *W.* 4. it is ordered, "that in all cases in which any particular number of days, not expressed to be clear (*a*) days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a *Sunday*, *Christmas-day*, *Good Friday*, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day

(*a*) *Vide Castle* v. *Burditt*, 3 *T. R.* 623., overruled in *Webb* v. *Fairmaner*, 3 *M.* & *W.* 473. And see *Gould* v. *Hole*, 4 *M.* & *R.* 301. *n*; *Rex* v. *Justices of Cumberland*, 4 *N.* & *M.* 378.

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also." (a) By 3 & 4 *W.* 4. *c.* 42. *s.* 43., it is enacted "that none of the several days mentioned in the 5 & 6 *Edw.* 6. *c.* 3. shall be observed or kept in the said courts (the superior courts of common law), or in the several offices belonging thereto, except *Sundays*, the day of the nativity of our Lord, and the three following days, and *Monday* and *Tuesday* in *Easter* week." By *R. H.* 6 *W.* 4., after reciting 3 & 4 *W.* 4. *c.* 42. *s.* 43., it is ordered "that henceforth, in addition to the said days, the following, and none other, shall be observed or kept as holidays in the several offices belonging to the said courts, viz. *Good Friday* and *Easter Eve*, and such of the five days following as may not fall in the time of term, but not otherwise, the birthday of our lord the king, the birthday of our lady the queen, the day of the accession of our lord the king, *Whit-Monday*, and *Whit-Tuesday*." (b)

Channell Serjt. It is not disputed that the 25th was kept as a holiday at the offices. But in *Bennett* v. *Potter* (c) it was held by the Court of Exchequer, that the office is closed on a holiday for the benefit of the officers, and that they may open it in order to enable the plaintiff to sign judgment, if they think fit.

TINDAL C. J. The last day is excluded from the computation only, when it falls on the days mentioned in the rules of court of *H.* 2 *W.* 4., *E.* 2 *W.* 4., and *H.* 6 *W.* 4. *Monday*, the 25th of *May*, was not one of those days. The rule for setting aside the judgment must therefore be discharged.

Rule discharged. (d)

(a) 8 *Bingh.* 307. See *Pounds* v. *Penfold*, 5 *N.* & *M.* 186.

(b) 2 *N. C.* 615.

(c) 2 *Cro.* & *J.* 622.

(d) By which rule it is ordered "that the days between *Thursday* next before, and the *Wednesday* next after *Easter day*, shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trial or notices of inquiry, in any of the courts of law at *Westminster*."

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June 17.

An award was made by an assistant tithe commissioner under 6 & 7 *W.* 4. *c.* 71. with respect to certain alleged district moduses. Both the vicar and the landowners of the parish being dissatisfied with the award, the vicar brought an action against one of the landowners, and seventy-four of the landowners brought actions against the vicar, in order to try the disputed right under issues to be directed pursuant to the forty-sixth section of the statute. The court refused to order the

THE plaintiff, who was the vicar of the parish of *Tenterden*, in *Kent*, in *March* 1831, filed a bill in ancery against the defendant and two other landers (since deceased) of the said parish, claiming to be itled, as vicar, to all tithes in kind, as well great as all, except tithes of corn, hay, and wood, within the l parish, and praying an account of such tithes. e defendants in their answer alleged that the parish *Tenterden* consisted of woodlands, of uplands, of rshlands, and of townlands, and that the woodlands re exempt from tithes; and after stating that the ds called uplands, townlands, and marshlands, were pectively distinguished by certain well known metes l bounds, the defendants set up a modus of 4*d.* an e in respect of the said lands called uplands, in lieu all tithes except of corn and hay: they also set up ilar moduses of 6*d.* and 8*d.* an acre in respect of the l lands called townlands and marshlands.

On the 13th *November*, 1832, the Vice-Chancellor le a decree, ordering the parties to proceed to a trial aw, and directing a separate issue in respect of each dus. These issues were tried at the Spring assizes the county of *Kent* 1835, when a verdict was und for the landowners, the plaintiffs at law, on each the issues, but with the special addition — "that ere was a modus proved for each of the said lands the value as above alleged, and that there was a ıtural mark or boundary, distinguishing the said lands lled the uplands and the marshlands, and that there

enty-four actions brought by the landowners against the vicar to abide the ıt of the action brought by him.

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was no evidence of a fixed boundary to the said lands called the townlands."

The above suit, as also a certain other suit instituted by *Pomfret* and another on behalf of themselves and the other owners and occupiers of lands in the parish of *Tenterden* against Mr. *Ward* and the ordinary and the patrons of the vicarage, for the purpose of establishing the alleged moduses, are still pending in the Court of Chancery.

On the 25th of *January*, 1840, an award was made by one of the assistant tithe commissioners under the 6 & 7 *W.* 4. *c.* 71., whereby, after reciting the proceedings in the first-mentioned suit, the said assistant tithe commissioner found and adjudged, that there was payable for the marshlands a modus of 8*d.* an acre in lieu of all tithes, except of corn, hay, and wood; but that there was no certain or defined boundary separating the uplands from the townlands, and that by reason of such uncertainty in the boundaries, the said moduses alleged to be payable in lieu of the vicarial tithes of the said uplands and townlands were altogether void and invalid. And, lastly, the assistant tithe commissioner found and adjudged, that the vicar of the said parish for the time being was entitled to all manner of tithes, except of corn, hay, and wood, arising and accruing upon all the lands of the said parish, except the said marshlands.

On the 23d of *April* the several landowners of the parish being dissatisfied with the award, so far as it related to the uplands and townlands, commenced seventy-four actions in this Court (*a*) against Mr. *Ward*,

(*a*) Under the 6 & 7 *W.* 4. *c.* 71., which provides (*s.* 46.) "that any person claiming to be interested in any lands, or in the tithes thereof, who shall be dissatisfied with any such decision of the commissioners or assistant commissioner, may, if the yearly value of the payment to be made or withholden according to such decision shall exceed the sum of 20*l.*, cause

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the vicar; and on the 25th Mr. *Ward*, being also dissatisfied with the award so far as it related to the marshlands, brought the present action against the defendant *Pomfret*.

On the 27th of *April* Mr. *Ward* commenced another action against Mr. *Pomfret* in the Exchequer, in which an appearance having been entered for the defendant, the plaintiff, on the 6th of *May*, delivered a feigned issue, with a notice of trial for the ensuing *Kent* assizes.

The issue so delivered was to the following effect: — "First, whether, from time whereof the memory of man is not to the contrary, there have not been, and there are not, within the said parish of *Tenterden* certain lands, called and known by the name of uplands, which have always been distinguished from the other lands in the parish by certain well known metes and bounds."

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an action to be brought in any of his Majesty's courts of law at *Westminster*, against the person in whose favour such decision shall have been notified in writing, in such manner as the commissioners or assistant commissioner shall direct, to the parties interested therein, or to their known agents, in which action the plaintiff shall deliver a feigned issue, whereby such disputed right may be tried, and shall proceed to a trial at law of such issue at the sittings after the term, or at the assizes then next or next but one after such action shall have been commenced, to be holden for the county within which such lands or the greater part thereof are situated; with liberty, nevertheless, for the court in which the same shall have been commenced, or any judge of his Majesty's courts of law at *Westminster*, to extend the time for going to trial therein, or to direct the trial to be had in another county if it shall seem fit for such court or judge so to do; and every defendant in such action shall enter an appearance thereto, and accept such issue; but in case the parties shall differ as to the form of such issue, or in case the defendant shall fail to enter such appearance, or accept such issue, then the same shall be settled under the direction of the court in which the action shall be brought, or by any judge of his majesty's courts of law at *Westminster*, and the plaintiff may proceed thereon in like manner as if the defendant had appeared and accepted such issue, &c.

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"Secondly, whether, from time whereof the memory of man is not to the contrary down to the time when the said vicarage was created and endowed, there was not of right paid and payable to the rector of the said parish for the time being, and after the creation and endowment of the said vicarage, there was not of right paid and payable to the vicar of the said parish for the time being by the occupiers of the said lands, called by the said name of uplands, if any, by equal half-yearly payments at *Lady-day* and *Michaelmas-day* in every year, or as soon after as lawfully demanded, the customary payment of 4*d.* for every acre of such lands occupied by such occupiers (the homestead and garden, if any, being included in such acreage), for and in lieu of and in full satisfaction for all tithes due or alleged to be due (except of corn and hay) from such occupiers to the said rector for the time being before the creation and endowment of the said vicarage, and to the said vicar for the time being after the creation and endowment of the said vicarage, arising and accruing within such lands, and so after that rate for a greater or less quantity than an acre."

Similar issues were delivered with respect to the townlands and uplands, and the acreage payments of 6*d.* and 8*d.* payable in respect of them.

A summons taken out in that case, calling on the defendant to shew cause why the feigned issue so delivered should not be the issue to be tried between the parties, was on the 27th of *May* attended on both sides before *Parke* B. The learned judge thought that he had no jurisdiction to direct any issue with respect to the uplands and townlands, and made the following order: — "I do order that the feigned issue delivered in this action (with notice of trial for the next assizes) be the issue to be tried between the parties, except as to the townlands

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uplands mentioned in the said issue, as to which I e no order."

n the 29th of *May* the defendant was served with writ of summons in the present action, and an issue delivered therein as to the uplands, townlands, and shlands, in the same terms and form as that de- red in the action in the Exchequer.

)n the 2d of *June* the defendant in the latter action ained a rule *nisi* to set aside the order made by Mr. :on *Parke*. On the 5th —

Bompas Serjt., on behalf of the plaintiff, obtained a e in this court, calling on the defendant to shew ıse why the feigned issue delivered in the present ıse should not be the issue to be tried between the :ties, and why the seventy-four actions commenced ainst the plaintiff in this action should not abide the :nt of this action, or why such rule should not be de therein as the court should direct.

The affidavit of the plaintiff's attorney on which the tion was grounded, stated that all the actions but one l been commenced by the same attorney; that the ponent believed that the majority of the landowners in parish of *Tenterden* were acting together in concert such attorney, and had raised a common fund for raying their expenses of contesting the disputed ht; that the defendant *Pomfret* was one of such downers to the extent of 700 acres, and had lands each of the said alleged districts of uplands, town- nds, and marshlands; that the present action was ought for the purpose of trying the whole question, possible, as to uplands, townlands, and marshlands; d that if the disputed right were to be tried in se- rate actions upon issues applicable to the lands of h particular owner only, the costs would be so dis-

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proportionate to the value of the tithes in dispute, as to compel the vicar to retire from the contest.

Channell and *Shee* Serjts. now shewed cause and took a preliminary objection, that the rule instead of being intituled in all the actions, was intituled in the cause of *Ward* v. *Pomfret* only. The Court held this to be a fatal objection; but it was understood to be waived.

This is an unprecedented application, and the rule should be discharged with costs. At all events the issue must be confined to the modus in respect of the marsh-lands. The question of boundary has been held to be for the jury; *Maddison* v. *Nuttall* (*a*), *Rudd* v. *Wright.* (*b*)

Bompas Serjt., in support of his rule. A right of appeal is given by the statute to either party who is dissatisfied with the award of the commissioners, or assistant commissioner. If required to elect, the plaintiff is willing to abandon his action in the Exchequer.

TINDAL C. J. We have no power to grant that part of the rule which prays that the seventy-four actions commenced against the plaintiff shall be ordered to abide the event of this action. The rule must therefore be discharged. The issue we direct is —

"Whether from time whereof the memory of man runneth not to the contrary, there hath been and now is within the parish of *Tenterden*, a certain known portion of the parish, consisting of lands called the marshlands, and whether, within such parish, there hath been from time whereof the memory of man runneth not to the contrary, and now is, a distinct modus of 8*d.* an acre payable in respect of such lands called marshlands."

Rule accordingly

(*a*) 6 *Bingh.* 226.; 3 *Moo.* & *P.* 544.

(*b*) 1 *Younge*, 147.

1840.

KEMBLE *v.* MILLS.

June 17.

A plaintiff went to reside abroad subsequently to his cause being set down for argument in the demurrer paper. On an application for security for costs, the court directed that the demurrer should be allowed to be argued; and in the event of the judgment being in favour of the plaintiff, that proceedings should be stayed until he gave security for costs.

SHEE Serjt., on a former day in this term, obtained a rule calling on the plaintiff to shew cause why he should not give security for costs in this action. The affidavit on which the motion was founded stated, that the cause had been set down for argument in the demurrer paper in *January* last, that the plaintiff had since gone to reside permanently in *Australia*, and that the defendant had taken no further step in the cause after becoming acquainted with that fact.

Cleasby now shewed cause. The motion is too late. It does not appear by the defendant's affidavit when the plaintiff went abroad, or when the defendant became aware of the fact. The greater part of the costs having already been incurred, the object of the present motion is, not to give protection to the defendant, but to prevent the cause being heard.

Shee Serjt., in support of the rule. The affidavit is sufficient. The application is in time, for no positive rule can be laid down as to the period when such a motion must be made.

TINDAL C. J. So far as relates to the demurrer, no further costs can be incurred. I think, therefore, that the justice of the case will be answered by allowing the demurrer to be argued, and, in the event of our judgment being in favour of the plaintiff, staying the proceedings until he shall give security for the costs.

Per Curiam.

Rule accordingly.

June 16.

DOE dem. HICKMAN *v.* HICKMAN.

The Court will not issue an attachment against an attorney for not delivering up papers pursuant to a rule of court, unless it appear that the demand was by a party duly authorised to make it, and that the authority of the party making the demand, was shewn at the time of making it.

STORKS Serjt., on a former day in this term, had obtained a rule for an attachment against the late attorney of the lessor of the plaintiff for not delivering up all papers, deeds, and writings in his custody, possession, or power, of or belonging to the lessor of the plaintiff, pursuant to a rule of court. The affidavit on which the motion was founded, stated that the deponent had demanded the papers early in *May*, but the attorney refused to give them up, and on the 29th of that month the deponent served him with a copy of the rule of court requiring the delivery of the papers, and, at the same time, shewed him the original rule, but that the attorney still refused to comply with the demand.

Atcherley Serjt. now shewed cause, and objected that the affidavit did not shew that the party making the demand was the party named in the order, or that he had, or had stated to the attorney that he had, authority to make such demand.

Storks Serjt., in support of the rule.

TINDAL C. J. The demand was not sufficient. The authority of the party making the demand must be shewn at the time that it is made. Persons are not to be brought into contempt upon such slight grounds as are alleged in this case.

Per Curiam.

Rule discharged, with costs.

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CLARE *v.* BLAKESLEY and Others.

June 16.

Where it appeared that the defendants had *bonâ fide* obeyed an order of *Nisi Prius* so far as lay in their power, the Court refused to grant an attachment against them for not having complied with the order.

THIS was an action for a libel contained in the deed of settlement of a joint stock banking company. At the trial it was agreed that the defendants should cancel the deed and prepare a new one omitting the objectionable matter, and that they should pay the plaintiff's costs. An order of Nisi Prius embodying the agreement was drawn up, and was afterwards made a rule of court.

R. V. Richards obtained a rule nisi for an attachment against the defendants for not obeying the order, upon affidavits stating that the old deed was still in existence.

Crowder now shewed cause upon an affidavit, in which it was sworn that every exertion had been used to comply with the order; that it was requisite to preserve the old deed until the whole of the parties to it, who were very numerous, had signed the new one, and that all had done so with the exception of one person who refused to sign; and that the old deed was kept sealed up in the custody of the directors of the company.

Richards, in support of the rule, contended that the defendants were at all hazards bound to obey the rule of court.

TINDAL C. J. As the defendants have done all they possibly could to obey the order, and have not wilfully been guilty of any act to affect or offend the plaintiff, I do not think that any sufficient ground exists for granting an attachment.

Rule discharged, without costs.

1840.

June 13.

MARRIOTT *v.* STANLEY.

In an action on the case for an injury which the plaintiff had sustained from being thrown down upon iron instruments placed by the defendant in the highway, contrary to the common law, and to the provisions of a local act of parliament, the defence set up (*a*) was, negligence on the part of the plaintiff, of which negligence no distinct evidence was given. The judge left it to the jury to say, whether the plaintiff had been so deficient in reasonable and ordinary care that he had brought the accident upon himself.

CASE. The declaration stated that on the 15th of *October* 1839, the defendant wrongfully and unlawfully set, placed, and exposed to sale in a certain public street in the city of *Peterborough*, in the county of *Northampton*, called &c. being a common public highway for all persons to go, pass, and repass, on foot, on horseback, and with carriages, every year and at all times of the year, at their free will and pleasure, divers cutting and sharp-pointed tools and implements, improper and dangerous to be set, placed, and exposed in such public street and highway, to wit, scythes, ploughs, pitchforks, harrows, sickles, and divers other dangerous implements and articles, and wrongfully, &c. kept and continued the same so there set, placed, and exposed to sale, for a long space of time, to wit, twelve hours then next following, and while divers persons were going, passing, and repassing on foot, on horseback, &c. in the said public street and highway, there, to the great danger and annoyance of the said persons, and contrary to the form of a certain act of parliament made and passed in 30 *G.* 3., intituled "An Act for paving and otherwise improving the city and township of *Peterborough*." That during the said time, while the said implements and articles were so wrongfully, &c. in the said public street and highway, being so there wrongfully set, &c. and kept, &c. during that time by the defendant as aforesaid, to wit, on &c. the plaintiff was

A verdict having been found for the defendant, a rule for a new trial was refused on the ground of misdirection; but it was granted, on payment of costs, as upon a verdict against evidence, and was afterwards made absolute.

(*a*) Under a plea of not guilty; as to which, see *R. H.* 4 W. 4., *post*, 570 (*a*).

in the said public street and highway there on the head of a certain horse of the plaintiff then ed to and drawing a certain cart of the plaintiff, then holding the said horse by the bridle, and uring to restrain and prevent the said horse nning away with the said cart in the said public id highway there, which the said horse, having ien accidentally frightened, was then endea- to do; and thereupon in so endeavouring to and prevent the said horse from running away said cart as aforesaid, (which the plaintiff then ind could have done without the happening of the injuries hereinafter mentioned, or any of r any part thereof, if the said implements and had not been so then wrongfully and unlawfully aid public street and highway there as aforesaid,) plaintiff then to wit, on &c. while the said imple- ind articles were so wrongfully set, &c. in the iblic street and highway there as aforesaid, by and in consequence of the same being so then et, &c. *and from no other cause whatsoever*, was lably thrown down, and the plaintiff struck and ihed with great force and violence among, upon, ainst the said implements and articles, and was then greatly and grievously cut, pierced, lace- wounded, bruised, and injured, whereby the f then became and was sick, hurt, lame, and l, insomuch that his life was then greatly de- of, and the plaintiff thereby remained and con- so sick, &c. for a long space of time, to wit, from e of the happening of the said injuries hitherto, means of the premises the plaintiff is likely ain and continue a cripple for the remainder of , and also by means of the premises, the plaintiff, all the time last aforesaid, not only suffered derwent great pain and anguish, and was put to

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a great expense, to wit, &c. in and about the provid
and procuring for himself, of medical and surgical ad
&c. and in and about the endeavouring to be cured
&c. but also during all the time last aforesaid
plaintiff, by means of the premises, was hindered
prevented from following and attending to his tr
and businesses of a carpenter and innkeeper, w
during that time he carried on and still carries on,
thereby lost and was deprived of divers great gains,
and the plaintiff, by means of the said premises,
been and is otherwise greatly injured and damni
to the damage of the plaintiff of 1000*l.*

Plea: not guilty. (*a*)

At the trial before *Bosanquet* J. at the last Sp
assizes for the county of *Northampton*, the follow
facts appeared: — On the 15th of *October*, 1839, be
the market-day at *Peterborough*, the defendant, an ir
monger, placed ploughshares and other implements
the public street in front of his house. About six
the evening the plaintiff was unloading his cart in fro
of his house, which nearly adjoins that of the defend
Whilst so engaged, a pony, by which the cart w
drawn, was attacked by a fierce dog, and ran off in th
direction of the defendant's house. The plaintiff caug
the bridle in his hand, and was running at the pony
head, endeavouring to keep him in. A waggon w
coming in the opposite direction, and when the plaintiff
and the cart reached the defendant's premises, he was
thrown down by the ploughs, and was severely injured.
The same pony, on the morning of the same day, whilst
standing with a cart in the street unattended, had been
struck by a stage-coachman, and going off at a smart

(*a*) No question appears to have been raised as to the admissibility of the defence set up, under a plea which puts in issue only "the wrongful act alleged to have been committed by the defendant." In *Cro. Jac.* 446. the defence was *pleaded*.

me in contact with a post, and had injured The plaintiff was thereupon advised not to ıy again into harness. Notwithstanding the ;h Paving Act (s. 16.), expressly prohibiting ices, it had been usual at *Peterborough* to ds for sale on the road side on market-days, said that the plaintiff had never complained ɔsing of ploughs, &c. for sale in front of the house. *Butterfield* v. *Forrester* (*a*) was relied lefendant.

ast, 60. In that ıdant, for the pur- ng some repairs to hich was close by d at one end of ad put up a pole f the road, a free g left by another reet in the same The plaintiff left a not far distant ace in question at in the evening in being light enough obstruction at 100 e, and if the plain- been riding very ht have observed it: the plaintiff, ɔ was riding vio- ıot observe it but it, and fell with d was much hurt nce of the acci- was no evidence of ntoxicated at the his evidence, *Bay-* d the jury, that if ng with reasonable care, could have ɔided the obstruc- they were satisfied aintiff was riding et extremely hard, ordinary care, they should find a verdict for the defendant, which they accordingly did. *Vaughan* Serjt. moved for a new trial and cited *Bull. N. P.* 26., where the rule is laid down thus: "So if a man lays logs of wood across a highway, though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me I may bring an action; for whenever a man suffers a particular injury by a nuisance, he may maintain an action, but then the injury must be direct (such as before mentioned) and not consequential, as by being delayed in a journey of importance. *Paine* v. *Partrick*, *Carth.* 194.; *Iveson* v. *Moor*, *ib.* 451." (The cases cited by *Buller* relate to the latter point only. The former part of the rule seems to be taken from 1 *Roll. Abr.* 88. There, however, the words are, "*ove* grand *care*;" and see 1 *Vin. Abr.* 554., 16 *Vin. Abr.* 20; but in *Fowler* v. *Sanders*, *Cro. Jac.* 446., which appears to be the same case, the plea itself, from which this inference is drawn, is set out, and this plea, which stated that the plaintiff *improvidè* turned his horse upon

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The learned judge told the jury, that the us had been shewn to exist, could not legalise th

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the blocks laid by the defendant, and fell, was held on demurrer to be bad.) The court refused to grant a rule *nisi*, *Bayley* J. saying that, "if plaintiff had used ordinary care, he might have seen the obstruction; so that the accident appeared to happen entirely from his own fault." Lord *Ellenborough*'s judgment is thus reported: — "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorise another *purposely* to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, *and no want of ordinary care to avoid it* on the part of the plaintiff." Of the propriety, to say nothing of the prudence, of one man's abstaining from riding *purposely* against several others, little doubt will perhaps be entertained. What shall be deemed *ordinary* care to avoid a danger, the existence of which there is no reason to anticipate, — as poles placed across the principal street of a populous town, — does not appear to be equally clear.

Butterfield v. *Forrester* was the case of a rule trial refused. If had been successful would have opened the continuance of ar and perhaps ruinous Some light is throw latter consideration which actually occu principal case. *M* plaintiff, having ma for a new trial absol ment of costs, began afresh after paying b and 70*l*. as the defen costs of the first trial, to his own costs of On the second tri expense of another establishing miscon defendant and dispr conduct in himself, himself to a verdict, jury returned with 1 So that the plaint been, as was shewn sult at the last tri right throughout, rec against which he m to have had to set of three trials (havin costs on both sides i addition to the ex temporary pain and nent injury, caused ginal disaster.

If, in *Butterfield* v. the ruling and the v been favourable to th the view taken by upon an application trial on the part o fendant, might pos been — that the rule correctly laid down

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the articles for sale in the public highway (*a*); but that in order to entitle the plaintiff to recover in this action, two things must concur, a wrongful act on the part of the defendant, and reasonable and ordinary care on the part of the plaintiff; and that it was for the jury to say whether the plaintiff had, in any degree, contributed to the injury of which he complained, by putting the pony into harness a second time on the same day, after the accident which had occurred, and the advice which he had received; in which case the defendant would be entitled to a verdict, according to the decision in *Butterfield* v. *Forrester*. (*b*) The jury having found a verdict for the defendant,

April 16.

Goulburn Serjt. in *Easter* term moved for a new trial on the ground of misdirection, and of the verdict being against the evidence. The immediate cause of the injury was the illegal act of the defendant. In *Bridge* v. *The Grand Junction Railway Company* (*c*), which was an action for negligence in the management of a railway train, whereby it ran against a railway carriage in which the plaintiff was a passenger, a plea that the parties, having the management of the train in which the plaintiff was, managed it so negligently, that in part by their negligence as well as in part by the defendant's negligence, the defendant's train ran against the other, was held to be bad, *inter alia* for not shewing that, by ordinary care, the parties having the management of the train in which the plaintiff was could have avoided the

N. P. 16.,—that a person riding in a king's highway has a right to choose his own speed, provided he do not injure the persons or the property of others,—and that the only question for the jury to consider was this,—whether the plaintiff was chargeable with such negligence as would, *to some extent*, have produced the evil which had occurred, even if the defendant had been perfectly free from blame?

(*a*) *Vide Fowler* v. *Sanders*, *Cro. Jac.* 446.

(*b*) *Suprà*, 571.

(*c*) 3 *M. & W.* 244.

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consequences of the defendant's negligence. In *Butterfield* v. *Forrester* (*a*) the plaintiff was urging his horse against the bar. In the present case it was shewn that the plaintiff had done all that he could to restrain the horse; and that it was the defendant, not, as in *Butterfield* v. *Forrester*, the plaintiff, who was the proximate and the immediate cause of the injury. The defendant, who had encumbered the highway, must be presumed to have known that he was acting against the local and the highway act. It is, therefore, a case of a party's wilfully doing that which he knows to be wrong; and though it may have been an imprudent act, on the part of the plaintiff, to put the pony into harness again on a day on which an accident had occurred, yet the immediate cause of excitement was the attack made by the dog.

There are several cases to shew that a party may be entitled to recover, although he may have brought the injury on himself, and may be, to a certain extent, a wrong doer. Thus in *Smith* v. *Pelah* (*b*) *Lee* C. J. ruled, that "if a dog has once bitten a man, and the owner having notice thereof, keeps the dog, and lets him go about, or lie at his door, an action will lie against him at the suit of a person who is bitten, though it happened by such person's treading on the dog's toes; for it was owing to his not hanging the dog on the first notice, and the safety of the king's subjects ought not afterwards to be endangered." *Bird* v. *Holbrook* (*c*) is to the same effect. There, the party having set a spring gun in his garden, the plaintiff entered the garden in pursuit of a strayed fowl and was wounded by the gun. It was contended that he was a trespasser and could not recover. But it was held that this was no answer to the action; and one of the judges referred to *Jay* v. *Whitfield* (*d*), where a boy who had entered the defendant's

(*a*) *Suprà*, 571.
(*b*) 2 *Stra.* 1264.
(*c*) 4 *Bingh.* 628.; 1 *M. & P.* 607.
(*d*) 3 *B. & Ald.* 308. *n.*

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ises for the purpose of cutting a stick, and was by a spring gun, recovered 120*l.* damages. Here, laintiff's case should have been put more strongly e jury. [*Bosanquet* J. I summed up favourably ıe plaintiff.] There was, however, a misapplication e rule as to the collision of ships and carriages, in ı it is said, that if the plaintiff be at all in the ; he cannot recover, however gross the misconduct e part of the defendant may have been. In *Buller's Prius*, 26. it is said, "If a man lay logs of wood ; a highway, though a person may, with care, ride by, yet if by means thereof my horse stumble and me, I may bring an action."

e verdict was also clearly against evidence, there no proof that the pony had run away before. *nquet* J. I cannot say there was no evidence. The question in the cause was, whether the plaintiff ıot been guilty of great carelessness in putting his into the cart. My impression is, that I told the that if the plaintiff had been guilty of great care- ess, and such carelessness had been partly the cause e accident (*a*), the plaintiff could not recover.] e was no proof that the pony was in a state of ment when the dog flew at his nose.

NDAL C. J. We will look at the learned judge's , and see how he left it to the jury.

SANQUET J., on a subsequent day, reported that ıd left it to the jury to say, whether the plaintiff been so deficient in reasonable and ordinary care, ıe had brought the accident upon himself.

NDAL C. J. I see no reason to find fault with the er in which this case was left to the jury. The ion seems to me to have been put more favourably

(*a*) Acc. *Williams* v. *Holland*, 10 *Bingh.* 112., 3 *M. & Sc.* 540., *P.* 23.

1840.

ROBERTS *v.* SNELL. *June* 4.

VIN. The plaintiff declared in the usual for taking his goods and chattels, and uning them against sureties and pledges (*b*),

In replevin against the assignee of the reversion of part of the premises de-

fendant may avow at common law, stating the facts specially, and portionment of the rent to be made by the jury; or he may avow l form given by 11 *G.* 2. *c.* 19. *s.* 22., as upon a holding at a cerand if he avow, under the statute, for the entire rent, or with a m the entire rent greater or less than the proportion properly beis interest in the reversion, the judge at *Nisi Prius* may direct o be amended, either by converting it into an avowry at common ing it as an avowry under the statute, by describing the rent in ith the proportionate value of the respective particles (*a*) or parts, ie reversion has been divided.

it the judge, or the court substituted by consent of parties for the *Prius*, may make such amendment, although first prayed for after delivered, and before it is recorded.

particulâ illâ," is the expression used in the statute of *Quia Emp-* 3., 18 *Edw.* 1. *st.* 1. *c.* 2., 2 *Inst.* 503.

vords, though they o be traversable, as distinguishing replevin from the spass. They imly that the dehe goods,—which him liable in tresat he detained them / offered by the the act, to enforce nce of which the taken. In a case cattle taken damit is said, (*Fitz.* *Edw.* I. tit. *Re-* 7.) "If a man damage feasant, hom they belong cient *pledges to* *make amends*, and the other refuses, he shall have replevin, and recover damages for the detention, and not for the taking." And see *Evans* v. *Elliott*, 6 *Nev. & M.* 606. As no proof is required from the plaintiff that any pledges have been tendered for the performance of the duty, or for the payment of damages, the action of replevin, either in the *detinet* or in the *detinuit*, may, it would seem, be maintained, in fact, however abusively, upon any species of wrongful taking; and in *Ireland* the action of replevin by writ has not been unfrequently resorted to for the purpose of trying a

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Avowry, in the form given by 11 *G.* 2. *c.* for 40*l.* for one year's rent of a dwelling-l stable held and enjoyed by the plaintiff as ten to the defendant, by virtue of a certain demi to the plaintiff theretofore made, at the rent o able half yearly, on, &c.

Plea in bar: *Non tenuit*, and *riens in arrer*

At the trial before *Bosanquet* J., at the Sum 1839 for the county of *Suffolk*, the followin peared:—In 1828 *Elizabeth Baldry* was tenar the house and stable with some land adjoini the undivided moiety of three fourths of an ac land, with reversion to *A. B. Gray*, in fee. I moiety of the three fourths of an acre, *E. B.* an were lessees from year to year. In that year, *A. B. G.* demised the whole, by indenture, to t for seventeen years. *E. B.* died, and in 183 having become tenant in fee in possession, c

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disputed title to property in goods; and even in the case of a detention upon a bailment (consignor of goods against consignee) Lord *Redesdale*, Chancellor of *Ireland*, refused to quash a writ of replevin; *Shannon* v. *Shannon*, 1 *Schoales & Lefroy*, 324. *Vide tamen Galloway* v. *Bird*, 4 *Bingh.* 299.; 12 *B. Moore*, 547.; and see *Emery* v. *Mucklow*, 4 *M. & Sc.* 263. In *Dore* v. *Wilkinson*, 2 *Stark. N. P.* 288., the learned reporter says, "In the course of this trial Lord *Ellenborough* intimated that the bringing of an action of trover was not the most convenient remedy in a case of this nature, and said that he had heard Mr. *Wallace* express his surprise that the remedy by replevin was not more frequently resorted of which the part tain possession of chattel of which l deprived, instead of trover, in whic recover damages which see *March*, 1 *Nightingale* v. *Ad* 91.).

Replevin does deeds relating to ance, and which, to the heir; (*T.* 10, pl. 4.) *per F arguendo*, in sup right of the heir to action of *detinue*, i it is said that *E* was of opinion wi This position is r Lord *Brooke*, *Br* pl. 34.

the defendant the premises contained in the demise of 1828, excepting the moiety of the three-fourths of an acre, in which *A. B. G.* had only a chattel interest. The value of this moiety was shewn to be one guinea per annum. It was contended for the plaintiff that upon this state of facts he was entitled to a verdict upon the issue of non tenuit, on the ground that rent cannot be apportioned upon an avowry as it may be upon a declaration in debt for rent, because, although a lessor may, by a partial alienation of his interest in the whole of the demised premises, convey to the alienee a right of distress, he cannot create several contemporaneous rights of distress by assigning the reversion in one part of the demised premises to one person, and the reversion in another part of the demised premises to another. The learned judge said that he would reserve the point; upon which the counsel for the defendant asked for leave to amend, in case it should become necessary, and that power might be reserved to the court to make any amendment which a judge would have power to make.

A verdict was then taken for the defendant,—rent arrear, 37*l.* 18*s.*, value of the goods, 37*l.* 18*s.*,—with liberty to the plaintiff to move to enter a verdict (*a*), and with power to the court to make any amendment which the judge might and ought to have made.

In *Easter* term *O'Malley* obtained a rule, calling upon the defendant to shew cause why a verdict should not be entered for the plaintiff, on the ground, first, that the rent should have been apportioned, not in an avowry under the statute (*b*), but by contract, or in an action of debt, or in an avowry at common law, as in

(*a*) The verdict for the plaintiff in replevin is usually taken for 4*l.* 4*s.*, a sum intended to cover the expenses of the replevin bond.

(*b*) 11 *G.* 2. *c.* 19. *s.* 22., authorising defendants in replevin to avow *generally*. *Vide post*, 581. (*h*).

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Harrison v. *Barnby* (*a*); and, secondly, that an assignee of the reversion in part of the premises demised cannot distrain; *Philpott* v. *Dobbinson.* (*b*)

Kelly now shewed cause. [*Tindal* C. J. referred to *Cossey* v. *Diggons.* (*c*)] In that case no question of apportionment arose. *Brown* v. *Sayce* (*d*) was a case very much of the same nature as *Cossey* v. *Diggons.* The distinction between those cases and the present is, that in the former the demise proved varied from the demise pleaded. [*Tindal* C. J. Can this case be distinguished from *Philpotts* v. *Dobbinson?* *Maule* J. It is the same in substance as if there had been a surrender and re-demise.] There may be a distress for an apportioned rent. [*Maule* J. Can the landlord distrain before there has been an apportionment by the contract of the parties, or by the verdict of a jury?] The landlord may distrain before apportionment. [*Tindal* C.J. At his peril. At common law, the circumstances must have been stated in the avowry.] But for the new rules, the defendant might have avowed for 20*l.*, 25*l.*, and 30*l.*, and any other sums at which it was thought probable that the jury would find the value. [*Maule* J. It would be almost impossible to anticipate in an avowry the precise sum which the jury might assess.] It would be most inconvenient if parties were held to one count or to one plea, and amendments were refused, because the other party relied on the variance. This action of replevin was commenced when the defendant had not avowed, and when he might have avowed for 37*l.* 18*s.*, not being bound by the sum

(*a*) 5 *T. R.* 246. That was the case of an avowry by one of two devisees in common of the lessor. And see *Kirkman* v. *Newstead*, *Esp. Dig.* 4th edit. 145.

(*b*) 6 *Bingh.* 104.; 3 *P.* 320.

(*c*) 2 *B. & Ald.* 546.

(*d*) 4 *Taunt.* 320.

(*e*) *Vide Serjeant* v. *C* 5 *Ad. & Ell.* 354.

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which he distrained. (a) [*Erskine* J. You treated it throughout as a claim for 40*l.*]

Gunning, on the same side. The objection taken was, that here there was no right to distrain at all. It was said that the assignee of part of the reversion may distrain, but not an assignee of the reversion in part of the premises. This is not so; *Neale* v. *Mackenzie* (*b*); *Stevenson* v. *Lambard* (*c*); 2 *Inst.* 503.; *Jacob* v. *Kirk* (*d*).

O'Malley, in support of his rule. The verdict would have been conclusive on the plaintiff to shew that he held under the defendant at the rent of 40*l.* (*e*) It has never been decided, though it has certainly been admitted by judges, that an assignee of part of the reversion may distrain. That doctrine depends upon the statement of Lord *Coke*, 2 *Inst.* 503. (*g*) But the doctrine, supposing it to be correct, does not apply to a case in which the defendant chooses to avail himself of the general form of avowry given by the stat. 11 *G.* 2. *c.* 19. *s.* 22. (*h*)

(*a*) So the defendant may avow for a different cause than that which he himself has alleged, as the ground for removing the plea into a superior court, *T.* 10 *E.* 2. *Fitz. Abr. Avowrie*, pl. 213.; *H.* 5 *E.* 2. *Fitz. Abr. Estoppel*, pl. 258.; and even after avowing in the county court for one cause, the defendant may, upon the removal of the action into a superior court, avow for a different cause, *T.* 20 *E.*, 3 *Fitz. Abr. Avowrie*, pl. 130. And see 3 *Co. Rep.* 26 *b.*; 3 *T. R.* 635.; 7 *T. R.* 654.; 1 *East*, 142. But if the plaintiff traverse that the defendant was bailiff, and it appears that the defendant distrained in his own right, the issue must be found for the plaintiff, although the lord adopted the distress. *Per Gascoigne* C. J. of K. B. *H.* 7 *H.* 4, fo. 34, pl. 1.; and see *Buller's* case, 1 *Leon.* 50.

(*b*) 1 *M.* & *W.* 747. 757.

(*c*) 2 *East*, 575.

(*d*) 2 *Mood.* & *Rob.* 221.

(*e*) See *Hancock* v. *Welsh*, 1 *Stark. N. P. C.* 347.

(*g*) See also *Co. Litt.* 148 *a*, 1 *Tho. Co. Litt.* 466.

(*h*) Which authorises defendants in replevin "to avow or make cognizance generally, that the plaintiff or other tenant of the lands or tenements whereon such distress was made, enjoyed the same under a grant or demise *at such a* certain rent during the time wherein the rent distrained for incurred."

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Supposing the defendant entitled to distrain, he might have avowed at common law without stating the sum at which the plaintiff held, but setting out the facts from which the apportionment was to be founded. He can have no right to resort to a form of avowry which would ever after bind the plaintiff to the payment to the defendant of a larger rent than the latter is entitled to receive. *Philpott* v. *Dobbinson* is directly in point. But the defendant was not entitled to distrain at all; *Neale* v. *Mackenzie*. (*a*) In *Harrison* v. *Barnby* (*b*) the old form of avowry was adopted. [*Maule* J. The amendment asked for is only to alter the sum of 40*l*. to 37*l*. 18*s*. *Kelly* referred to *Whitwill* v. *Scheer*. (*c*)] The amendment proposed in that case was stated before the case had closed. Here, no amendment was asked for during the trial. The jury had given their verdict before any amendment was asked for, and then the judge had no power to amend. [*Tindal* C. J. You made the motion by leave of the judge: it was part of that leave that the court might amend. *Erskine* J. It was part of the same reservation.] The jury should be placed in the condition of deciding upon the amended record. The plaintiff might have gone into evidence, and might have negatived the amended avowry by calling surveyors who would have proved that the relative value of that part of the demised premises which was conveyed to the defendant, and of that part which was not conveyed, was different from that assumed in the amended avowry. [*Tindal* C. J. That might be obviated, according to Lord *Coke*.] What is said by Lord *Coke* (*d*) applies to a different state of pleadings. The defendant has not yet decided whether he takes the amendment or not.

(*a*) 1 *M. & W.* 747., reversing the judgment which had been pronounced in favour of the landlord by the Court of Exchequer; 5 *Tyrwh.* 1106.; 2 *C. M. & R.* 84.; *Gale*, 119.

(*b*) 5 *T. R.* 246.

(*c*) 8 *A. & E.* 301.; 3 *N. & P.* 398.

(*d*) 2 *Inst.* 503.

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TINDAL C. J. If the strict rule were adhered to, the cause would go down to a new trial, with leave to the defendant to amend on payment of the costs of the amendment and of the former trial. If the case had occurred before me, I should have directed an amendment either by substituting an avowry at common law, or by altering the amount of the rent avowed for. (*a*) I think the defendant should retain the verdict, amending his avowry by stating 37*l.* 18*s.* as the amount of the rent, and paying such costs as would be necessary to amend the pleadings, and the costs of the former trial, to be deducted from the general costs of the cause.

Rule accordingly. (*b*)

(*a*) As to which see *Gayler* v. *Farrant*, 4 *New Cases*, 286.

(*b*) And see *Rivis* v. *Watson*, 5 *M. & W.* 255., as to the apportionment of fee farm rents converted, by severance from the reversion, into rents-seck, and then, by the operation of 22 *Car.* 2. *c.* 6. *s.* 8., into rents-charge.

PADDOCK *v.* FORRESTER and GOODFELLOW, otherwise BRUNDRED.

The crown may forbid the awarding of a writ of *nisi prius* in in a suit between subject and subject, in which the crown has an interest. (*a*)

TRESPASS. The declaration stated that the defendants, on 1st *January* 1834, and on, &c., broke and entered divers closes of the plaintiff, at *Stoke-upon-Trent*, in the county of *Stafford*, to wit, &c., and with shovels, pickaxes, &c., dug up, turned up, and subverted the earth and soil, to wit, and dug, made, and sunk divers mines, pits, shafts, and holes, of great breadth and depth, to wit, of the breadth of 20 feet, and of the depth of 2000 feet, in the said several closes, and from and out of the said mines, pits, shafts, and

The statement that the crown is interested, and that the attorney general does not assent to the issuing of a writ of nisi prius, but requires a trial at bar, may be made in this court by the attorney general *ore tenus*.

(*a*) Subject to an appeal, *ut videtur*, post, 586. *n.*

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holes so dug, made, and sunk as aforesaid, and al out of certain other mines, pits, shafts, and holes ther tofore dug, made, and sunk in and upon the said clos respectively, then raised, dug, and got divers lar quantities of coals, culm, earth, soil, stones, ore, a other minerals of the plaintiff, to wit, &c.; and the san so raised, dug, and got from and out of the said mine pits, shafts, and holes, the defendants then seized, too and carried away and converted to their own use; and c the several days and times aforesaid, the defendan with their feet in walking, and with cattle, to wit, & and with wheels, &c., trod down, &c. To the plain tiff's damage of 500*l.*

Plea: 1st, Not guilty. 2dly, A traverse of t coals, culm, earth, soil, stones, and other minerals, bei the coals, culm, &c. of the plaintiff. 3dly, A justificati under an immemorial right of mining in the Crown, a a demise by His late Majesty King *George* III. to Lo *Granville* of the mines, &c. under the closes in questi and within the manor of *Newcastle-under-Lyne* (*a*); leging that the defendants, as his agents, committed t

(*a*) The castle and the lordship or manor of *Newcastle-under-Lyne* are described as part of the duchy of *Lancaster* in the conveyance made by *Henry* VI. in parliament, to certain trustees to the use of his will; 5 *Rot. Parl.* 165. *b.*, recognized *ib.*, 354. *a.*, 385. *a.*

The duchy of *Lancaster* was annexed to the crown by *Edward* IV. in such a way as to prevent a merger; and as the earls and dukes of *Lancaster* had *jura regalia*, the crown has the same prerogatives in the county palatine and in the duchy, as in lands held *jure coronæ*; Case of the duchy of *Lancaster*, *Plowd.* 212.; *Dyer*, 209, 232.; *Regina* v. *Archbishop of York*, *Cro. El.* 240 *Astell* v. *Clarke*, 2 *Lutw.* 1237 *Alcock* v. *Cooke*, 5 *Bingh.* 340 2 *M. & P.* 625.; 17 *Vin. Ab* 73, 93, 94. Though the Duche of *Lancaster* has, *in the cour of the duchy and of the county palatine*, the same prerogativ as the Queen of *England* has *Westminster*, it does not, p haps, necessarily follow that t Duchess is, *in the courts Westminster*, entitled to ro prerogatives in respect of duc land (*post*, 589. n.), which may be assumed, would h been claimed in vain by the e of *Lancaster*, or by *Henry Lancaster*, or his son in *John* of *Gaunt*, the two d who were not kings of *Engl*

trespasses. 4thly, A similar right and demise, alleging the right to be to get coals, &c., making compensation for surface damage, and justifying accordingly. 5thly, A justification, under the prescription act 2 & 3 *W.* 4. *c.* 71., by the defendants as servants, under a claim of right by Lord *Granville* to get coal, &c. used for forty years. 6thly, Same as the last, but averring the right to be subject to compensation. 7thly, Same as the 5th, but for twenty years. 8thly, Same as the 6th, but for twenty years. 9thly, That the defendants entered to get coals and work mines, &c. as servants to His late Majesty King *William* IV., whose mines they were. 10thly, A similar justification under a right in Her present Majesty. 11thly, Statute of limitations.

Replication: To the first and second pleas, joining issue: to the third plea, traversing the prescriptive right as pleaded and taking issue thereon; to the 4th plea, without denying the right as pleaded, that after the breaking and entering, &c., and before the commencement of the suit, the plaintiff gave notice to the defendants, and claimed a reasonable compensation for the user of the closes and for the damage occasioned thereby, and that the defendants refused to make such compensation; to the fifth plea, a similar traverse of the right as to the third plea; to the sixth plea, a similar claim of compensation as in the replication to the fourth plea; to the seventh plea, traverse of the right; to the eighth plea, a similar claim of compensation as in the replication to the fourth and sixth pleas; to the ninth, tenth, and eleventh pleas respectively, traverse of the right.

After the plaintiff had thus replied (*a*) the attorney-general came into the Common Pleas, and stated to the court, that the Queen was interested in the question,

(*a*) It did not appear that, at the time this motion was made, the defendant had rejoined to the special replications. The application would therefore seem to have been made *quia timet*.

not be heard in this Court (*a*). He said that as the matter came upon him by surprise, he interposed merely in order that it might not be considered that the claim of right of audience had been acquiesced in.

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TINDAL C. J. As at present advised, I think the right of the attorney-general to appear in this court on behalf of the crown, is not taken away by our late decision. The attorney-general (*b*) has certified that the crown is interested in the matter in dispute between these parties, and has stated that Her Majesty

(*a*) The right claimed (which seems to be somewhat analogous to that of the ministers of the crown, in *France*, to be heard in either chamber), not being founded on the warrant of 1834, would not be affected by a decision relating only to the nullity of that warrant.

(*b*) An attorney at law is either a person appointed to appear for a party in a particular action, or in all actions in which the client is concerned in a particular court, or in all actions generally. The term attorney-general appears to be properly applicable to the third class only.

Formerly all great lords had their attorneys-general.

In the Duke of *Norfolk*'s case (*M.* 39 *H.* 6., fo. 32, pl. 45.) it was held, that a man is bound by the act of his attorney-general as well as by the act of his attorney appointed *ad lucrandum vel perdendum* in a particular cause.

Of late years the appointment of attorneys, both of the second and of the third class, except in the case of the crown, has fallen into disuse, and the appointment of attorneys of the second class on the part of the crown, has been less frequent than formerly.

The king appears to have usually had an attorney, either of the second or third class, in the Common Pleas; but no trace has been discovered of any pleadings in this court on behalf of the crown being conducted by any persons who were not of the degree of the coif. The king's serjeants no doubt received their instructions from the king's attorney, whether appointed generally for all courts, or specially for the Court of Common Pleas.

On the Patent Rolls of the early part of the fifteenth century we have entries of the appointment of one attorney-general, during pleasure, and of another (in 11 *H.* 4.) for life.

"*Will'us de Lodyngton*, attornatus regis in communi banco, et in aliis locis quibuscunque, ad placitum regis." — *Rot. Pat.* 237. "*Thomas Tykhull*, attornatus domini regis in communi banco, et in omnibus aliis curiis, quamdiu se bene gesserit." *Ib.* 256. It must not be assumed that *Lo-*

e an account, *H. 3* l. 30.
ign of *Mary, R.* l in the reign of *Fleming*, were dis- the *office* of serjeant in order that they able of serving the ie capacity of soli- , *Serviens ad legem*, . In the reign of *oderidge* Serjt. (af- idge of this Court) ited serjeant to *ry*, and was soon lischarged from the jeant, for the pur- pose of enabling him to accept the appointment of solicitor-general. After holding the latter office for a short time, he was promoted to that of king's serjeant. *Prince*'s Worthies of *Devon*, 301.

Aid of the king may be had before issue. But in *H.* 15 *H.* 7., fo. 17., pl. 11., it was said that it had been "held by the serjeants" in 5 *H.* 7., that if a man justify, in trespass, as the king's bailiff of a manor which he has by reason of his Duchy of *Lancaster*, the defendant shall not have aid until issue joined.

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for money had and received, and upon an int stated.

Nunquam indebitatus, and a set-off. At the e *Bosanquet* J. at the *London* sittings in this demand was stated to be for rent received by ant to the use of the plaintiff. On the 17th 838 the plaintiff, who had a life interest in of redemption of the moiety of a small farm *am* in *Essex*, rented by Mrs. *Phœbe Seabrook*, rable quarterly, released his interest in that edemption to the defendant, who was already of the plaintiff's moiety, and owner of the ety. Evidence was tendered on the part of iff, for the purpose of shewing that, at the ie execution of the deed of release, it was ween the parties, that the rent for the current ould be apportioned, and that the plaintiff entitled to receive a portion of the rent

Where land in the possession of a tenant for years, is conveyed by deed, the right of the purchaser, as assignee of the reversion to receive the whole rent for the current quarter cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between the assignor and assignee.

CASES

ARGUED AND DETERMINED 1840.

IN THE

COURT OF COMMON PLEAS,

IN

Trinity Vacation,

IN THE

THIRD YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in Banc during this Vacation were,

TINDAL C. J.	ERSKINE J.
COLTMAN J.	MAULE J.

WILLIAM BAYLIS *v.* HENRY EUSTATIUS STRICKLAND, JOHN MOSELEY GILBERT CHEEK, and JAMES ATKINS, Esquires.

TRESPASS. The declaration stated that the defendants assaulted the plaintiff and imprisoned him in the common gaol at *Worcester*, for divers, to wit,

Under the Municipal Corporation Act (sect. 65.), the council have power to require from a common crier, as a ministerial or executive officer of the borough, the delivery up of the town bell, as part of the goods of the body corporate; such crier having been appointed by the old corporation, and having been removed from office upon the election of the council under the act.

And in case of refusal, he may be proceeded against by summary conviction before the justices of the borough, in the manner pointed out in the sixtieth section.

The borough justices have jurisdiction upon an information laid before them, in which such an offence is charged; and where the conviction upon such an information is still subsisting, and is not void *ex facie*, neither the justices nor

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'Who saith that *William Baylis*, now residing in the parish of *Bengeworth* in the said borough, cordwainer, late the public crier for the said borough, and, as such crier, an officer of the said council, but who has lately been removed from such office of crier, has now in his possession a bell used by him in his said office, the property of the said council of the said borough; and that on the 13th day of *November* instant, a notice in writing, directed to the said *William Baylis*, under the hands of this complainant as mayor of the said borough, and of *James Atkins*, *Anthony New*, and *Thomas White*, three of the council of the said borough, directing the said *William Baylis* to deliver to Mr. *James Taylor*, the town clerk of the said borough, (who was thereby authorised to receive the same,) the said bell lately used by him, the said *William Baylis*, in his said office of crier, was personally served upon the said *William Baylis*; and that ever since the service of the said notice on the said *William Baylis*, he, the said *William Baylis*, has wilfully neglected to deliver the said bell to the said *James Taylor*, as required by the said notice; nor hath the said *William Baylis* given any satisfaction to the said council, or to the said *James Taylor*, concerning the said bell; against the form of the statute in that case made and provided. And this informant therefore prays, that a warrant may be issued to apprehend and bring the said *William Baylis* before two or more of Her Majesty's justices of the peace, to answer unto this information and complaint, and to be further dealt with according to law.

" *Thomas N. Foster.*"

" Taken and sworn before
J. M. G. Cheek."

On the 21st of *November* 1837, a summons was issued under the hand and seal of the defendant *Cheek*, whereby, after reciting the information, the constables

and *T. W.*, three of the council of the said borough, directing the said *William Baylis* to deliver to Mr. *James Taylor*, the town clerk of the said borough, (and who was thereby authorised to receive the same,) the said bell lately used by him the said *William Baylis* in his said office of crier of the said borough, was personally served upon the said *William Baylis*, and that ever since the service of the said notice on the said *William Baylis*, he the said *William Baylis* has wilfully neglected to deliver the said bell to the said *James Taylor*, as required by the said notice, or to give any satisfaction to the said council or to the said *James Taylor* concerning the said bell, against the form of the statute in such case made and provided: whereof the said *W. Baylis* is duly convicted by us, the said justices. These are, therefore, in Her Majesty's name, to command you, the said constable, to convey the said *William Baylis* to the said keeper, and you, the said keeper, are hereby required to receive the said *William Baylis* into your custody into the said gaol, and him there safely to keep without bail, until he shall deliver up the said bell, or give satisfaction in respect thereof, to the said council or to the said *James Taylor*. And for so doing this shall be your sufficient warrant. Given under our hands, the 30th *November* 1837.

(Signed by the three justices.)

Under this warrant the plaintiff was committed to *Worcester* gaol. Against this conviction and warrant the plaintiff appealed to the quarter sessions, stating for cause, first, that the justices had no jurisdiction; secondly, that the bell was his own property; thirdly, that the complainant had no legal authority to lay an information before the defendants; fourthly, that the defendants acted from corrupt, political, and personal motives; fifthly, that the town council had not authorised the complaint; sixthly, that *Taylor* was not authorised to

upon which *R. V. Richards* applied for a nonsuit. The learned judge, however, refused to nonsuit the plaintiff, and the defendants called witnesses to prove that the bell was the property of the corporation, and that the plaintiff had on the 13th of *November* been served with a copy of a notice signed by four members of the town council, requiring him to deliver up the bell. (*a*) The learned judge told the jury that the matter for their consideration was, whether the plaintiff had suffered unjustly by the interference of the defendants, —that the evidence of property in the bell was not strong, — that the warrant upon which the plaintiff was committed was not a warrant authorising the gaoler to detain him for a certain time, but until he should give up the bell, — that if the bell was, as the plaintiff asserted it to be, his own property, the defendants might, with equal reason, and quite as honestly, demand the coat from his back, or the money out of his pocket, and imprison him for life if he dared to disobey that mandate, — that it was not for him to indicate the amount of damages to be awarded, but that he trusted that, where men were guilty of oppression, ample and sufficient damages would, in *England*, always be awarded to the injured party. The jury found a verdict for the plaintiff, with 5*l.* damages. The learned judge gave the defendants leave to move to enter a nonsuit, in case the court should be of opinion that they were protected by the conviction.

In the following term *W. J. Alexander* moved for a nonsuit, on the ground that the plaintiff had mistaken his form of action, or for a new trial, on the ground that the learned judge had improperly admitted evidence of the bell being the private property of the plaintiff, no such evidence having been adduced before the defendants at the hearing of the information.

(*a*) *Suprà*, 592.

well was corporate property. The sixtieth section, which applies to officers newly appointed, is differently worded from the sixty-fifth. The words of the latter section are, "every officer," not "every such officer." Before the Municipal Corporation Act, the property (*a*) would have been recoverable only in an action of trover. [*Maule* J. If the property were books of account, no doubt could exist.] The validity of the act of the magistrates and their responsibility ought not to depend upon evidence not produced before them. *Lowther* v. *Lord Radnor.* (*b*)

W. J. Alexander, on the same side. Should the Court be of opinion that the defendants are not entitled to a nonsuit, there should be a new trial on the ground of the improper reception of evidence. There was a subsisting conviction; *Massey* v. *Johnson.* (*c*) It may be admitted that the conviction will not avail the defendants if they had no jurisdiction; *Rex* v. *St. Nicholas, Hereford.* (*d*) The first part of the sixty-fifth section is merely directory (*e*); *Rex* v. *St. James, Westminster.* (*g*) The conviction ought to have been received as conclusive evidence for the defendants. *Basten* v. *Carew.* (*h*) [*Maule* J. There something was done by the magistrates to give themselves jurisdiction. You do not get

(*a*) *i.e.* its value, *antè* 578. *n.*

(*b*) 8 *East*, 113.; and see *Bramwell* v. *Penneck*, 7 *B. & C.* 534., 1 *M. & R.* 409.; *antè*, 364. (*a*).

(*c*) 12 *East*, 69.

(*d*) 10 *B. & C.* 832.; 5 *M. & R.* 676.

(*e*) As to the distinction between those provisions in statutes which are *essential*, and those which are *directory* only, see *Co. Litt.* 360 *a.*; *Rex* v. *Sparrow*, 2 *Stra.* 1123.; *Rex* v. *Loxdale*, 1 *Burr.* 445, 7.; *Rex* v. *Pole*, *Selw. N. P.* 7th ed., 1071. *n.*; *Leicestershire case*, 1 *Peckw.* 45.; *Margate Pier Company* v. *Hannam*, 3 *B. & Ald.* 266.; *Rex* v. *Mayor of London*, 4 *Mann. & Ryl.* 36. 51., 9 *B. & C.* 1.; *Pearce* v. *Morris*, 4 *N. & M.* 48., 2 *A. & E.* 84., *Antè*, 460.

(*g*) 2 *A. & E.* 241.

(*h*) 3 *B. & C.* 649.; 5 *D. & R.* 558.; and see *Hutchinson* v. *Lowndes*, 4 *B. & Ad.* 118.; 1 *N. & M.* 674.; *Wiles* v. *Cooper*, 5 *N. & M.* 276.

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out of the difficulty as to the jurisdiction by producing the conviction.] The act gives an appeal against convictions, and therefore it was treated as a conviction. The 131st section provides "that any person who shall think himself aggrieved by any summary conviction in pursuance of this act, may appeal to the next court of general or quarter sessions of the peace, to be holden, not less than twelve days after such conviction, for the county or for the borough wherein the cause of complaint shall have arisen, provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least (*a*) before such sessions, and shall also either remain in custody until the sessions, or enter into a recognizance, with a sufficient surety, before a justice of the peace within such three days, or at any time during his custody, on giving to the complainant three days' notice in writing of his intention so to do, and of the name, description, and place of abode of his proposed surety, conditioned, personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance entered into, the justice before whom the same shall be entered into shall liberate such person, if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be dealt with and punished according to

(*a*) *Vide Gould* v. *Hole*, 4 *Mann. & Ryl.* 300. n.; 4 *M. & W.* 380. (*b*).; 4 *A. & E.* 780.; *antè*, 557.

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:tion, and to pay such costs as shall be awarded, , if necessary, issue process for enforcing such ."

laintiff has estopped himself from saying that t a conviction, by carrying the case before the essions by appeal, on the ground that it was ion. [*Maule* J. You say, if the conviction is your defence, or that, if the conviction be then the plaintiff's remedy will be by action se.] Having treated this proceeding as a con- t the sessions he cannot now bring trespass. C. J. You cannot make it a conviction.] At , it is a record of a proceeding by magistrates, efore was admissible under the authority of *Carew*. [*Erskine* J. You moved on the ground lence had been improperly received, and for ion.] Parties are at liberty to give additional before the court of quarter sessions on an oth in support of and against the conviction, or the purpose of making the convicting magis- espasser. *Lowther* v. *Lord Radnor*.

Cur. adv. vult.

AL C. J. now delivered the judgment of the

vas an action of assault and false imprisonment ustices of the peace of the borough of *Evesham*, l granted a warrant upon which the plaintiff risoned. The jury found a verdict for the with 5*l*. damages; and a rule *nisi* was obtained lefendants to set it aside, and to enter a non- leave of the judge who tried the cause.

uestion which was principally argued before us, n which the maintenance of the action depends, hether the magistrates had jurisdiction to grant

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of their office, or within three months after its tion, of an account in writing of all matters com- l to their charge, and of all moneys received and ded by them, and for the payment of the balance and provides a remedy, in case of refusal to deliver me, or in case of the non-delivery of all books, , and writings in their custody or power, which ding is particularly marked out in that section. ixty-fifth section gives power to the new council ıove from office every ministerial or executive of such borough, who shall be in office at the f the first election of councillors under the act, en enacts, that every officer who shall be in pos- of any "moneys, *goods*, valuable securities, and papers belonging to or concerning the body ate, whose officer he is," shall deliver them up, required in the manner therein pointed out, and ıroceeds thus: "that the council shall have the remedy to recover the same as is hereinbefore ed in the case of officers appointed by such l." And we think this enactment virtually in- ates into the sixty-fifth section the whole course ceeding pointed out by the sixtieth, as if it had epeated there, with such variations as are neces-) make it applicable to the subject matter of the ifth section.

therefore think that the magistrates who con- the plaintiff had jurisdiction, and that there is g upon the face of the conviction itself to make it and, consequently, that neither the magistrates e officer executing the warrant, can be treated as ısers, and that the rule for entering a nonsuit ɔe made absolute.

Rule absolute. (*a*)

(*a*) And see *Fernley* v. *Worthington*, *antè*, 491.

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uages, &c. within the said manor (*a*), and entitled ght of common upon the commons and waste lands ein; and that the said *T. S. Champneys, Charles* d *Dacre, G. Trevor, G. Boscawen,* and *J. Lloyd* e entitled to all mines and minerals whatsoever in, er, and upon the commons and waste lands.

y this act (s. 40.) it was provided, enacted, and de- ed that nothing therein contained should prejudice efeat the right or interest of the said *T. S. Champneys,* rles Lord *Dacre, G. Trevor, G. Boscawen,* and *J.* yd, or any of them, or their respective heirs or gns, or any other person or persons who should reafter be lord and lords of the said manor, or be tled to the mines or minerals in or under the said mons or waste land, or their lessee or lessees, in and ll mines, ores, minerals, and coals, of what nature or l soever, in or under the said common or waste land; that the said *T. S. Champneys, Charles* Lord *Dacre, Trevor, G. Boscawen,* and *J. Lloyd,* and their respect- heirs and assigns, and their lessee and lessees, nts, servants, colliers, miners, and other workmen, uld and might, from time to time, and at all times eafter, enter into, have, hold, enjoy, search, and k all mines and mine-works, pit-holes, beds, veins, other bearings of mines, ores, minerals, and coals tsoever, as fully and effectually as they could have , held, or enjoyed the same before the passing of t act; and for that purpose should and might use all , shafts, levels, soughs, and tunnels already open l sunk in any of the said commons and waste lands, l all machines, engines, and buildings thereon erected standing, together with full and free liberty, power,

(*a*) As it is not said that all e persons were copyholders leaseholders under *Champ- s*, and as in the subsequent ceedings they, together with *mpneys*, are described as "the lords of *Mold*," it is probable that this term "within the said manor" is used in a loose and popular sense. See *5 M. & R.* 153. *n.*; and that note expanded, *P. Cycl. Manor.*

and coals, and all other mines and minerals whatsoever there found and raised as aforesaid, and to do all other reasonable and necessary acts and things in and upon the same commons and waste lands and grounds, when enclosed, for the discovering, getting, working, converting, removing, carrying away, selling, and disposing of all mines, coal and other minerals whatsoever, without any molestation or interruption whatever, the said *T. S. Champneys*, *Charles* Lord *Dacre*, *G. Trevor*, *G. Boscawen*, and *J. Lloyd*, and their respective heirs and assigns, lessee or lessees, and their and every of their agents, tenants, miners, colliers, and other workmen, doing as little damage and injury by or under the powers thereby reserved to them, as might be, and making satisfaction for all and every damage and injury that should or might arise or happen to any allotment or allotments which should be set out under the said act, to the owners and occupiers thereof, in such manner and upon such terms as they and such owner and owners, occupier and occupiers respectively should mutually agree for, and that in case of any difficulty or neglect of or in any party so agreeing, every such satisfaction and respective satisfactions should be adjusted and determined from time to time as occasion should arise, by disinterested arbitrators, to be chosen as therein directed, and with the powers therein defined.

By indenture of lease, bearing date the 24th of *June* 1836, and made between Sir *Thomas Mostyn*, Bart., the Rev. *R. Howard*, D.D., the Rev. *John Conway Conway*, *Phœbe Lloyd*, and *Susannah Lloyd*, the Rev. *Thomas Heagh Clough*, *George Boscawen*, Esq., the Hon. *Gertrude Brand*, *Cadwallader B. T. Roper*, Esq., and *Charles B. T. Roper*, Esq., of the one part, and the plaintiffs *John Taylor*, *Stephen Davey*, *Joseph Martineau*, *Anthony Hudson*, and *Christopher Maltby* (since deceased) of the other part, it was expressed that the said *Mostyn*,

s lease the plaintiffs worked various mines nclosed and uninclosed parts of *Mold Moun-* of which mines, called the *Fownog* mine, was :t distance from the eastern boundary of the :losed lands described in the lease. The aving discovered a valuable course of ore, ın of which was towards other lands of which ants were lessees under one *Joshua Price*, a unk by the defendants, who worked towards fs' mine until they reached a wall which had by *Price*, but which the plaintiffs represented achment upon them. A claim having been ıe plaintiffs to the ore which they said had ı under land lying beyond the defendant's it was agreed between the plaintiffs' lessors as follows.

as doubts have arisen with regard to the line / between a field called *Braindrainiog*, belong- *Joshua Price*, and the common adjoining the ɜ former being leased and worked by *Edward* others, and the latter by the *Mold* Mines' and whereas it is desirable to have the true aid out by reference to the maps of both y have agreed, and do hereby agree, to leave o be determined by an indifferent surveyor some distance from *Mold*, and unconnected of the parties. As witness our hands, this f *May* 1839.

The letters — *J. P.* — of *Joshua Price.*
Robert Williams, } For the lords of
John R. Edwards, } *Mold.*"

rt Williams, to
surveyor as above."

owing addition to this agreement was after- ɜ upon the same paper.

ɔove parties, not having been able to appoint

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roof of title in the lessors — that supposing s to be seised, the spot in question was not in the demise, as it does not appear in the d that, assuming the lessors to be seised, and in question to be comprised in the demise, assed to the lessees by reason of the non- of the lease by two of the lessors.

irned judge over-ruled these objections, but defendants leave to move to enter a nonsuit. having been found for the plaintiffs, damages

April 23.

Serjt. moved, in *Easter* term last, for a non- iew trial.

endants are entitled to a rule *nisi* for entering on two grounds; first, the absence of title in iffs, who have not shewn either title in their or possession under the lease in themselves of, from which the ore was dug. Secondly, the tion of the lease by two of the parties therein as lessors. [*Tindal* C. J. The latter objection only in reduction of damages. (*a*)]

endants are entitled to a rule for a new trial, he learned judge admitted in evidence the of 25th *March* 1839, an agreement which be read for want of a stamp, and to which lants were not parties. The agreement of 1839, varied the original agreement of 14th . It therefore required an additional stamp. *r. Simpson* (*b*), an indorsement upon an agree- nlarging the time for performance, was held ite a new agreement, and to require a fresh ough it is immaterial at what time the stamp

vide infrà, 623.; *Elliott* v. *Hulme*, *R.* 434. (*a*)

(*b*) 3 *M. & W.* 78.

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is affixed; *Reed* v. *Deere* (*a*), *Stephens* v. *Lowe* (*b*). [*Tindal* C. J. The time of affixing the stamp becomes material when the point to be ascertained is, whether the stamp is *functus officio?* It seems to me, however, that in this case, the two memorandums constitute one agreement.] The Court will not hold, as it was contended that because *Price* acted for the defendants on some other occasion, they were bound by his signature to this agreement.

A rule having been granted, except as to the objection to the stamp, which the Court held to be sufficient,

June 25. *Jervis, R. V. Richards,* and *Channell* Serjt. now shewed cause. First, supposing it to be necessary to shew the title of the plaintiffs' lessors, that title is proved by the *Mold* Inclosure Act, which amounts to a legislative declaration, that the parties mentioned in the preamble to that act, were entitled to all mines and minerals whatsoever, in, under, and upon the commons and waste lands within the said manor. It is also proved by the fortieth section, which protects those lessors in working the mines. Although the rights of entering and working generally are preserved as they existed before passing of the act, the clause allowing them to dig, &c. is absolute and unconditional. It was also shewn that rent and royalties had been paid by the plaintiffs to their lessors, which is the ordinary evidence of seisin. The lease upon which these payments were made is not merely a demise of the minerals, but a grant of right to get at them, which rights are given by the act these landholders, their lessees and assigns.

Secondly: The case on the other side is, that the close does not appear upon the plan. It is not conceded that it does not so appear, but supposing that were the spot in question would pass by the words, "and all

(*a*) 7 *B. & C.* 261., 2 *C. & P.* 624.

(*b*) 9 *Bingh.* 32., 2 *M. & Scott,* 44.

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, upon, or under all or any part of that large tract of ommon called *Mold Mountain.*" There is nothing to nilitate against this extended construction, except the oncluding words, "and all which are particularly lescribed, delineated, and distinguished in the map or lan thereof annexed to these presents." But a false escription at the end will not prejudice the previous ant. Here, the real boundaries were shewn, and it as proved that the wall built by *Price* did not form the undary. Evidence of acts of ownership in one part a common are evidence of seisin of the whole com-n. *Stanley* v. *White* (*a*), *Tyrwhitt* v. *Wynne* (*b*), *Doe* v. *Barratt* v. *Kemp* (*c*), *Jones* v. *Williams.* (*d*)

Thirdly: There was no improper reception of evi-nce. The object of the referee in staking out the e was, to fix the boundary for all time, and not for a re temporary purpose, and there having been a evious communication between the defendants and the eree, and the plaintiffs' lessors, they had made them-res parties to the agreement.

Talfourd Serjt., *Welsby* and *Townsend*, in support of rule. In trover, a plaintiff must shew property as l as possession. This is not an action of trespass, nded upon the possession. Some evidence of title uld have been given, as in the case of an action by reversioner for trees cut down. The plaintiffs, in der to shew possession, put several matters together, hich, taken singly, would prove nothing. The recital the act is not evidence against third persons. The t itself being of the nature of a private contract be-ween the parties, is evidence only against those persons to whom notice is required to be given by the rules of

(*a*) 14 *East*, 331, 332.
(*b*) 2 *B. & Ald.* 554.
(*c*) 7 *Bingh.* 332., 2 *New Cases*, 102., 3 *M. & P.* 173., 2 *Scott*, 9.
(*d*) 2 *M. & W.* 326.

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of the lease by some of the intended lessors, that would go only to the amount of damages.

AL C. J. This was an action of trover brought rer from the defendants the value of certain s of lead and other ore. The jury found a or the plaintiffs, damages 700*l.*, which, I sup- s the value of the ore. Three objections were the trial. First, it was said that, in order to ie plaintiffs to recover, they must shew property re, whereas all that had been done was to put ease to the plaintiffs, without shewing any title lessors, or any possession whatever under the Undoubtedly a lease from *A.* to *B.* is not evi- gainst *C.* It would not, therefore, have been t for the plaintiffs merely to put in the lease. he case of a demise of minerals lying under an e district, it is not possible that the lessees nter upon, and take actual possession of, every hat which forms the subject of the demise. Be- hich, the mode of occupying a mine is not to afford the same evidence of possession as ipation of the surface, the produce of which is lly consumed and renewed. When ore is t is gone for ever. There could not have been l enjoyment by the plaintiffs of that part of the which a trespass was committed by the de- in taking away the ore. Possession under a may be shewn by the occupation of parts of that s comprised in the demise, and that has been re.

second objection is, that the spot in question is in the description contained in the lease. The t of the description applies to that part of *Mold in* which is included in the map. The words ll and all manner of mines of lead ore, &c., in,

defendants. The dispute is, therefore, brought to this, what is the boundary between the *Mold Mountain* and *Braindrainiog-?* The jury found that the boundary line between the two properties was the zigzag line set out by *Edward Williams* under the agreement entered into between the respective lessors; and, in deciding this second objection, it must be assumed that that agreement was properly received in evidence.

The third question is, whether the learned judge was justified in letting in the two agreements.

By the first agreement, the boundary was to be determined by an indifferent surveyor. By the second agreement, a particular person, *Williams*, was substituted, instead of a person to be appointed generally. *Williams* went to the spot with the maps, with which he had been furnished by the parties by whom he was appointed, heard their statements, and staked out a boundary line. It was said that a tenant is not to be bound by an agreement into which his landlord chooses to enter, and it is certain that a landlord cannot so bind his tenant; but the real question upon this part of the case was, whether *Williams* had set out the boundary by the assent of the defendants, given either before or after the boundary was ascertained. The evidence was this: a person was employed by the lessors of the plaintiffs, and the lessors of the defendants, to set out the boundary between the lands claimed by them respectively. The defendants were directly interested in the subject-matter of the inquiry. They knew that the boundary was about to be set out, and communicated with *Williams* as the person by whom it was to be set out. They accompanied him when the line was staked out; and before the decision was finally made they applied to the plaintiffs' lessors for a lease of the spot in question, in case the decision of *Williams* should be in favour of the latter. I think, therefore, that there was sufficient evidence that the defendants

between the respective landlords, were not even admissible in evidence as against the defendants. Generally speaking, it is true that a tenant is not bound by the acts of his landlord; but the question here is, whether the defendants did not adopt the acts of *Price* by the manner in which they interfered with the proceedings of *Williams*, and by the application made by them for a lease before *Williams* had pronounced his decision, in case that decision should be unfavourable. It appears to me that their conduct amounted to acquiescence, so as to place them in the same situation as if they had been originally parties to the agreement under which *Williams* was appointed to determine the boundary. I am therefore of opinion that the rule for entering a nonsuit should be discharged.

ERSKINE J. I am also of opinion that this rule ought to be discharged. The claim of the plaintiffs is founded upon a lease of mines and minerals under certain lands in a particular district, from a part of which the ore in question is alleged to have been taken by the defendants. Three objections are raised to the plaintiffs' right to recover: first, that it is not shewn that the plaintiffs' lessors had any title to grant the lease; secondly, that it is not shewn that the plaintiffs enjoyed the spot in question under the lease; thirdly, that the verdict was founded upon evidence which had been improperly received.

The plaintiffs, in answer to the first objection, rely upon the recitals which are to be found in the *Mold* Inclosure Act (*a*); but the recitals in an act of parliament are not evidence against those who are not either parties or privies to the enactment. They also rely upon the fortieth section of that statute; but that section only reserves the rights which are alleged to exist.

(*a*) *Suprà*, 604.

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If the case had rested on the title of their lessors as it existed before the granting of the lease, the plaintiffs must have failed. But in the absence of evidence of title in the defendants, it was sufficient for the plaintiffs to shew possession of the spot from which the ore had been taken. The defendants had no title unless the spot in question were under *Braindrainiog*, which it was shewn not to be, supposing the evidence of the agreement to have been properly received.

The next question is, whether the plaintiffs were in possession. The jury have found that they were so. From the nature of the property, it would be impossible to shew actual enjoyment by the plaintiffs of the spot from which the ore was dug by the defendants. The plaintiffs, not being lessees of the surface, were not in a situation to shew a right to the minerals through the medium of acts done by them upon the surface. The lease by which the plaintiffs claim, purports to be a grant of all mines and minerals under a certain district; and the further question which arises upon this part of the case is, whether the spot in dispute was or was not included in the grant. It is not contended that this spot comes within the words "in, or upon, or under all or any part of the messuages or tenements, fields, closes, or parcels of land, described and set forth in the map hereunto annexed;" but the lease goes on to say, "and also in, upon, or under all or any part of that large tract of common called *Mold Mountain*." If, therefore, the spot in question be either under the inclosed lands described in the map, or under part of *Mold Mountain*, it will be included. It was clearly the intention of the lessors to demise all the mines and minerals up to the ancient boundary. It is said that the final reference to the map shews that nothing was intended to pass which was not included in the map; but we must look at the words of the description as well as the words

ɜ to the map. If it was the intention of the o let every thing up to the boundary, it is evi- ɜt the object of referring to the map would be, hew the extent of the grant towards the bound- to define the eastern boundary, but to specify icular portion of *Mold Mountain*, viz. the 1400 ıe mines and minerals under which were in- to be included in the grant. The lease was ter the old zigzag line had been destroyed, and ıad been built in a straight line by *Price*, and ıerefore, a person going to the spot would natu- ɔpose the wall to be the true boundary. It was ʏ to be accurate in defining the line between nises described by the lease and those parts of *ɹrs'* lands which were demised to other parties. *ɹ*hat was the boundary of the ancient lands? a matter which the jury have examined into and . Have the plaintiffs been in possession under e? It is shewn that they have exercised acts of ıip in various parts of the property demised, as already observed, not in the precise spot on ıe question in this case arises. I think, there- ıt the plaintiffs are entitled to recover, unless ɹr evidence has been received.

memorandum, the admissibility of which was l to, contained an agreement between the plain- sors, and *Price*, the lessor of the defendants. ɟreement could not, of itself, be evidence to affect ɐndants; but, though the defendants were not ly parties to that agreement, they might make ıce against themselves by their subsequent con- *Williams* was seen by the defendants in the act ıining the boundary. It was known by them was staking it out; but, in order to make ɔumstance evidence of their acquiescence, it was ʏ to shew for what purpose *Williams* was stak-

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se of mines and minerals under lands lying within tain boundaries, accompanied by a statement, by y of affirmation, that all these lands are described in ertain map. Supposing that the affirmation would, en by itself, exclude the *locus in quo*, still, as the ner description states the boundary on the east in ns which are unequivocal, I think that a false statent, introduced by way of affirmation only, and not way of exception or limitation, would not prevent former words from having their full operation. ere are numerous cases to that effect. (*a*) But it ears to me that it is not necessary to resort to that e of construction in the present case, because I think t the spot in question is not excluded by the subsent description. The map, which is drawn upon a y small scale, does not describe walls or fences. :h parcel of land is numbered, and the numbers, a the owners' names, and the quantities of land con-ed in each parcel, are placed in distinct columns in ther part of the deed. The effect is the same as if particular parcel, instead of being designated as No. ., had been described as a close called *Blackacre*. demise of the minerals under *Blackacre* would have rated as a demise of the minerals under the whole of close bearing that name. It appears to me, there-e, that there really is no contradiction between the ner demising parts of the deed and the subsequent rds referring to the map or plan annexed.

In the course of the argument a point was raised (*b*), ough not much insisted on, affecting the amount of mages. The plaintiffs were shewn to have been in ssession (*c*) of the entirety of the mines and minerals

(*a*) *Goodtitle, d. Radford* v. *uthern*, 1 *M. & S.* 299.; *ddock* v. *Fradley*, 1 *Cromp. &* 90.; and see *Doe, d. Free-d*, v. *Burt*, 1 *T. R.* 701.

(*b*) Namely, the non-execution of the lease by some of the parties called in the memorandum "the lords of *Mold*."

(*c*) See *Dockray* v. *Befis*, 1 *Roll. R.* 19.; *Harper* v. *Charlesworth*, 4 *B. & C.* 574.

inion that the memorandum was properly admitted dence, and that the rule which has been obtained ıtering a nonsuit, must be discharged.

Rule discharged.

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E, on the demise of ANN BUTCHER *v.* MUSGRAVE, Clerk.

June 24.

ECTMENT, to recover a canonry of the Queen's Free Chapel of *St. George* at *Windsor*, and divers, ł, 10 messuages, 10 cottages, 10 barns, 10 yards, ırdens, 10 orchards, 100 acres of arable land, 100 of meadow land, and 100 acres of pasture land ɔo belonging; and also other 10 messuages, &c. the appurtenances, situate and being in the county *rks*, to wit, at *Windsor* in that county.

The defendant, who was one of the canons of the Queen's free chapel of *St. George* at *Windsor* demised by way of mortgage for ninety-nine years, if uld so long live and continue a canon, to the lessor of the plaintiff. "All ıe canonry of him the said *R. A. Musgrave*, of the Queen's free chapel *George* at *Windsor*, and all glebe and other lands, messuages, tene- , and hereditaments *belonging thereto;* and all and every the rights, profits, emoluments, privileges, advantages, and appurtenances to the ınonry belonging."

ejectment brought on the demise of the mortgagee, it appeared in evidence here was no property attached to any individual canonry, but that the property belonged to the dean and chapter, and that the surplus rents, ayment of certain expenses thereout, were divided equally among the dean ıe other members of the chapter; that all the canons had houses assigned m for their residence, but that no particular house was appropriated to any ınonry; that whenever a vacancy occurred the canons had a right of choice ? vacant house according to their seniority, and that the house which was fter the other canons had made their selection, was assigned to the new . The defendant had retained possession of the same house which was ıed to him upon his installation.

ld, that ejectment would not lie either for the canonry of the defendant, or ıe house assigned to him for his residence as canon.

ld also, that the defendant was not estopped, by the mortgage deed, from ng that the house in question did not belong to the canonry.

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part thereof:" To hold the said canonry, glebe, and other lands, hereditaments, rents, profits, and all and singular other the premises thereinbefore demised, or intended so to be, with their appurtenances, unto the said *Ann Butcher*, her executors, administrators, and assigns for the term of ninety-nine years, to commence and be computed from the day next before the day of the date thereof, if the said *R. A. Musgrave* should so long live and continue canon of His Majesty's said Free Chapel: Upon the trusts, nevertheless, thereinafter declared, being trusts for the better securing to the said *Ann Butcher*, her executors, &c., of the said sum of 5000*l.* and interest. And by the said indenture, the said *R. A. Musgrave* appointed the said *Ann Butcher*, her executors and administrators, to be his attorney and attorneys, to ask, demand, sue for, recover and receive from all persons who should be liable or intrusted to pay the same respectively, the rents, profits, and produce of the said canonry and hereditaments thereby granted and demised, and on payment thereof, to give, sign, and execute effectual receipts, &c. for the same respectively; and on non-payment thereof, to bring, carry on, and prosecute any action or other proceeding whatsoever, for recovering and compelling the payment thereof respectively, and to adjust and settle all accounts and things relating to the same premises, and for all the said purposes, to use the name of the said *R. A. Musgrave*, &c. The deed contained covenants by *Musgrave*, that he had good right to demise the canonry, for quiet enjoyment after default, and for further assurance.

Mr. *St. Croix*, the chapter clerk of the dean and canons of the Queen's Free Chapel of *St. George* within the Castle of *Windsor*, who was called on behalf of the lessor of the plaintiff, stated, that on the appointment of the defendant as canon, he took possession of a house

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assigned to him by the chapter, in which he still continued to reside. According to his evidence, the course pursued as to the allotment of residences on the installation of canons is as follows. With the exception of the dean, there is no specific appropriation of any particular house to the members of the chapter. When a stall becomes vacant by the death of a canon, the house occupied by such canon becomes also vacant. The other canons have a right to take possession of the vacant house according to their seniority. After they have exercised their right of choice, the new canon, upon being installed, has the remaining house assigned to him (but not by any writing) by the chapter as his residence. The witness also stated, that the chapter generally is possessed of property, but that there is none belonging to any individual canon, as such; that after defraying the expenses of the chapel, and of repairing the canons' houses (as after mentioned), the surplus rents and funds of the chapter are divided equally between the dean and the canons; that the chapter do what are usually called landlord's repairs to the houses of the canons, and that tenant's repairs are done by the respective occupiers; that if a canon omit to reside in the house allotted so him for a specified time, or to observe the statutes and ordinances of the college, his canonry becomes vacant; and that a canon must be in priest's orders before he can be installed, but that there is no cure of souls belonging to a canonry.

For the defendant it was contended, that ejectment will not lie for a canonry; and that the defendant, as canon, had no legal estate or interest, either in the house assigned to him for his residence, or in the common funds of the chapter; that with respect to the house he had the mere use and occupation of it so long as he should continue a canon, the legal estate being in the chapter at large. The defendant's counsel cited Doe

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v. *Fletcher* (*a*) and *The King* v. *The Inha-Belford.* (*b*)

lessor of the plaintiff it was submitted that will lie for a canonry which, although an al benefice, has no cure of souls attached to ıe argument of *Gundry* in *The King* v. *The London* (*c*), *Dr. Sand's* case (*d*), and *Frere* v. were cited. It was further contended that ınt had a freehold in his canonry, and in the ıging thereto, which passed by the mortgage : he was estopped by that deed from denying l an assignable interest; and that, at any rate, :h an interest in the house in which he re-ight be delivered over by the sheriff under a *here facias possessionem.*

ırned judge gave it as his opinion, that an will not lie for a canonry, and that a valid ot be made of a canonry, as such, being an al office, only capable of being held by a priest's orders; that if the canonry involved of the estate, such estate might be granted; ere was no land or house specifically attached ng to the canonry in question. The learned ght, that if the mortgage deed had designated ular house, in the possession of the defen-grantee might, as against the defendant, have an ejectment; but that no grant of any spe-was contained in the deed. With reference position of *Gundry* in *The King* v. *The Bishop* (*c*) the learned judge denied that an eject-d lie for a prebend, considered as a stall in a though it might be maintained for lands held of such prebend; and he remarked that since

& C. 25.
. & C. 54.; 5 M.

(*c*) 1 *Wils.* 11. 14.
(*d*) *Skinner*, 121.
(*e*) 8 *Price.* 475.

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should read and subscribe the thirty-nine articles, it is clearly within the 13 & 14 *Car.* 2. *c.* 4., which requires him to be a person in priest's orders. With respect to the derivation of the word prebendary, Lord *Coke*, in *The Dean and Chapter of Norwich*'s case (*a*), says that "*præbenda dicitur a præbendo, quia præberet auxilium episcopo.*" This, however, is denied by other authorities. Dr. *Burn*, in his *Ecclesiastical Law*, tit. *Dean and Chapters*, s. 3., observing upon the passage from Lord *Coke*, says, that "he had his name, on the contrary, from the assistance which the church afforded him in meat, drink, and other necessaries," and refers to *Gibson's Codex*, 195. n. b., where it is stated, "*Præbenda dicitur a præbendo, quia præberet auxilium episcopo*, saith my Lord *Coke*, which leaves no distinction between a canonry and a prebend; whereas, in truth, the first is a name of office, and the second only of maintenance, and a prebendary was so called, not from the assistance he afforded to the bishop, but from the assistance the church afforded him, in meat, drink, and other necessaries. * * * To which agrees the distinction expressly made by *Lyndwood* between those two: Canonia est jus spirituale quod aliquis assequitur in ecclesiâ, per receptionem in fratrem et assignationem stalli in choro et loci in capitulo: præbenda verò est jus spirituale recipiendi certos proventus pro meritis in ecclesiâ, competentes percipienti ex divino officio, cui insistit, et nascitur ex canoniâ tanquam filia a matre." It may be admitted that, where a manor or rectory is specifically allotted to a prebend, the prebendary has power to charge or demise it, for this seems the result of the authorities: *Watson's Clergyman's Law*, p. 472., *Hare* v. *Bickley*. (*b*) Where a manor is so allotted the prebendary may assign it, and still retain

(*a*) 3 *Co. Rep.* 75. *b.*

(*b*) *Plowd.* 526. and *Dyer*, 221. *b.*

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ıe house belonged, not to the defendant but regate corporation. If the lessor of the ıld maintain ejectment for the house in ques- ɔuld equally have a right to maintain it in ıny other house which the defendant might, o time, select as his residence.

Serjt., in support of his rule. This being an y a mortgagee against a mortgagor who is in f the mortgaged property, many of the argu- h have been urged on behalf of the de- not open to him; for he is estopped from he had no title to convey that which he has grant. [*Tindal* C. J. The question, whe- operty passed, arises upon the mortgage deed *Doe, dem. Bristow* v. *Pegge*, (*a*) Lord *Mans-* I found this point settled before I came into that the court never suffers a mortgagor to title of a third person against his mortgagee, le the mortgage, and it does not lie in his ay so, though such third person might have recover possession." So in *Goodtitle, dem. Bailey* (*b*) the same judge says, "If a man solemn deed, covenanting that another shall remises, and likewise for further assurance, it lie in his mouth to dispute the title of the ıom he has so undertaken, no more than it mitted to a mortgagor to dispute the title of ee. No man shall be allowed to dispute his deed." So here, although the question may effect of the mortgage deed, and although, ird parties, the court might inquire into the aggregate corporation, the defendant cannot,

r. *R.* 758. *n.* (*b*) *Coup.* 597.

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church; *Buller* J. said, "This is not a mere spiritual office, but a freehold attended with temporal advantages." So this is a freehold office attended with temporal advantages, and there is no sufficient reason why it should not be the subject of an ejectment.

The fair result of the evidence certainly is, that there is no house specifically appropriated to any particular stall, and that the revenues of the dean and chapter form one common fund, which is divided among the body. But with respect to the house in question, it is clearly assignable. The cases shew that a prebendary does not lose his stall or his voice in the chapter by a grant of the property attached to the office; *Sharrock* v. *Bourchier* (*a*), *Com. Dig. Ecclesiastical Persons* (C. 4.), *The Dean and Chapter of Norwich*'s case. (*b*) Therefore no argument can arise from its being necessary that the person holding the office should be in priest's orders. It is clear that the house stands in a different position from the lands of the corporation. [*Maule* J. Supposing the defendant had occupied some other house at *Windsor*, would he be estopped by the deed from saying that it did not belong to the canonry?] In the case put the defendant might not be estopped; but here the house did belong to the canonry; for as soon as the house was assigned to the defendant, he acquired a several interest therein, and if the defendant had any interest in it at all, the lessor of the plaintiff is entitled to recover. After a canon gets into possession of a house, he cannot be molested in the enjoyment of it, but may retain it so long as he holds his office; for it is not necessary that the house should be assigned to him by deed. (*c*) In *Hardy* v. *Cathcart* (*d*) the letting of prebendal houses seems to be spoken of as a matter of ordinary occur-

(*a*) *Sir T. Raym.* 88.
(*b*) 3 *Co. Rep.* 75. *b.*
(*c*) *Suprà*, 628.
(*d*) 5 *Taunt.* 2.

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ıay, sometime in one place and sometime in
As, for example, if there be eighty acres of
ıich have been used time out of mind of man
ded betweene certaine persons, and that a
ımber of acres appertain to every of these
s, for example, to *A.* thirteen acres to be
ıgned and lotted out, so as sometime the
res lie in one place and sometime in another,
the rest; *A.* hath a moveable fee-simple in
:res, and may be parcell of his manor, al-
have no certaine place, but yearly set out
places, so as the number only is certaine and
ılar acres or place wherein they lie after the
aine. And so it was adjudged in the King's
on an especial verdict." (*a*) But it is not
o inquire what might have been the effect
endant's changing his house, for he still re-
ıme residence. The question is, whether the
:he mortgage are sufficient to comprise the
ı one sense they clearly are, and, if so, they
e so construed; for the rule is, that words
e taken most strongly against the grantor.

C. J. This case comes before us on a mort-
e by the defendant, one of the canons of
ıy demise for ninety-nine years, if he should
ve and continue a canon, of "all that the
' him the said *R. A. Musgrave*, of the King's
l of *St. George*, at *Windsor*, and all glebe and
ls, messuages, tenements, and hereditaments
thereto, and all and every the rights, rents,
ıoluments, privileges, advantages, and appur-
o the same canonry belonging; and all the
ht, title, and interest of him the said *R. A.*

(*a*) *Moore*, 302.

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trem et assignationem Stalli in Choro et Loci in capitulo: Præbenda vero est jus spirituale recipiendi certos proventus pro meritis in ecclesiâ, competentes percipienti ex divino officio, cui insistit; et nascitur ex canoniâ, tanquam filia à matre." This ejectment having been brought for the canonry, which is an ecclesiastical office only, it is sufficient to say that it is not the proper subject-matter of an ejectment. Ejectment will not lie for any thing that the sheriff cannot deliver, and it is clear that the spiritual right adverted to could not be delivered under a writ of possession. It is true that ejectment will lie for tithes, but that is by virtue of the statute 32 *H.* 8. *c.* 7. *s.* 7., which gave the same remedy for tithes in the temporal courts as for corporeal hereditaments. Besides the canonry, the demise here contains the general words, "All glebe and other lands, messuages, tenements, and hereditaments belonging thereto, and all and every the rights, rents, profits, emoluments, privileges, advantages, and appurtenances to the same canonry belonging." I cannot read these words without understanding that they are intended to describe the *corpus*, out of which the profits accruing to the canon are to be derived. But according to the evidence of Mr. *St. Croix*, it appears that neither this house nor any other property is annexed to the canonry, but the defendant merely has the use of the house for the purposes of residence. Whenever a house becomes vacant by a vacancy in a canonry, the other canons may make choice of it according to seniority; the new canon taking the house which is left. On a second avoidance, the latter has a right to change his house for another; but the whole of the houses are the property of the dean and chapter, and the particular canons merely have the use of them for the discharge of their duties. It seems to me that this ejectment cannot be maintained either for the canonry or for the house, as the latter

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canons, the fee of the houses belongs to the dean and chapter; that no particular house is allotted to any canonry, but that, whenever a vacancy happens, the canons have a right, according to their seniority, to select the vacant house, and that the house which remains after all the others have exercised their right of choice, is assigned to the new canon. It appears to me that the house occupied by the defendant cannot be said to belong to his canonry. With respect to the canonry itself, for the reasons already given by the Lord Chief Justice, it cannot be the subject of an ejectment. The case that struck me most was *Dr. Sand*'s case (*a*), and great stress has been laid by the counsel for the lessor of the plaintiff on the language there used by *Jones* J. The only object, however, which that learned judge had in view, was to shew that the executors of a deceased prebendary, to whom a house had been allotted which he had occupied, were liable for dilapidations. No question was raised there in whom the legal interest of the house was vested. That case, therefore, cannot be looked upon as an authority that the legal interest in this house was in the defendant. Under all the circumstances of the case, I think that the canonry cannot be the subject of an ejectment, and that, with respect to the house, that it did not pass by the mortgage deed.

ERSKINE J. I also am of opinion that the nonsuit entered in this case ought not to be disturbed. The first question is, whether the lessor of the plaintiff is entitled to recover the canonry. According to all the authorities, a canonry, in itself, is a mere office, of which the sheriff cannot deliver possession, and for which therefore ejectment will not lie. The next question is,

(*a*) *Skinner*, 121.

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e sum of 5000*l.* upon the security of two ich he held; that the lessor of the plaintiff rous of obtaining further security for her debt, the defendant executed the deed in whereby, after reciting that he had been duly nstituted, and installed one of the canons of Free Chapel of *St. George*, within His castle , he demised to the lessor of the plaintiff for f ninety-nine years, if he should so long live ıe such canon, "all that canonry" &c. [The lge here referred to the parcels in the deed.] ɔn is, whether, under these words as against ant himself, the house assigned to him for ce passed. If the words comprehend the ree that the defendant cannot say he had no ʏey it. But it appears to me that the words ble only to such things as belong in severalty n for his sustenance and support, or what is corps of the canonry or prebend. Some ɪrty might formerly belong to this canonry, was not necessary to shew whether any such as attached to it or not. The question is, use belong to the canonry? The evidence l shewed that it belonged to the dean and ıo placed a canon in it, in order to enable harge the duties of his office. If that be so, use was not comprehended in the mortgage, uently no estoppel can arise. In *Dr. Sand's* ɛclesiastical Court having entertained a suit a prebendary against the executors of his for dilapidations, all that the Court of ch decided was, that it would not interfere ion. That case is no authority to shew that f the succeeding prebendary to recover for ıs was in respect of any legal estate or in- ı he had in the house. In the case of the

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Vicars Choral of Chichester (*a*), there see been an assumption that one of the four the assignment of a messuage to him, acq to it in severalty, and might have maintain for it. But it was not necessary to decid for the Court held that the land had not b That case is therefore no authority for th that a party in the situation of the defend signment to him of a house, may maintain for such house.

Rul

(*a*) *Goodtitle d. Miller* v. *Drew*, 11 *East*

June 26.

Newton and Wife *v.* Harland an

Where a tenant remains in possession after the expiration of his term, a landlord is not justified in expelling him by force, in order to regain possession.

Semble, that possession so acquired is not sufficient to vest the possession in the landlord with relation to the termination of the term.

TRESPASS. The declaration stated fendants, on 2d *March* 1837, with for assaulted the plaintiff *Frances*, then and st wife of the plaintiff *Augustus Newton*, an and laid hold of her the said *Frances*, an force and violence pulled, thrust, pushed, her about, and gave and struck her divei otherwise ill-treated her, and then force pelled her to go into a certain highway, along divers other highways, whereby the was much exposed to the inclemency of and by reason of the premises the said *Fr* and was sick, sore, and disordered, and &c. &c.

When a verdict is found for the defendant upon an issue whi tion, the jury cannot assess contingent damages for the plaintii assent of the defendant.

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ı: first, not guilty, whereon issue was joined; lly, as to the assaulting, seizing, and laying hold said *Frances*, and pulling, thrusting, pushing, and ng her about, and forcing and compelling her to o a certain highway, as in the declaration men- , that the defendant *Harland*, before and at the ime when &c., was lawfully possessed of a certain ıg house, with the appurtenances, situate and at *Studley*, in the county of *York*, and being so sed thereof, the said *Frances* just before the said hen &c., to wit, on the same day and year in the ation mentioned, was unlawfully in the said dwell- ouse, and with force and arms making a great and disturbance therein, and at the said time &c., stayed and continued therein making such and disturbance without the leave or licenee, and t the will of the defendant *Harland*, and during at time greatly disturbed and disquieted the de- ıt *Harland* in the peaceable and quiet possession ıjoyment of his said dwelling house, and thereupon fendant *Harland* then requested the said *Frances* se making her said noise and disturbance, and to l depart from and out of the said dwelling house, the said *Frances* then wholly refused to do, upon the defendant *Harland*, in defence of the sion of his said dwelling house, and the defendant , as his servant and by his command, at the said hen &c., gently laid their hands upon the said *es* in order to remove, and did then remove, the *Frances* from and out of the said dwelling house, n so doing did necessarily a little pull, thrust, and drag her about, and force and compel her to o the said highway, as they lawfully might for the aforesaid, doing no unnecessary damage to the *Frances* on that occasion, which are the said sup- trespasses in the introductory part of the plea

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mentioned, and whereof the plaintiffs have complai[illegible] against the defendants. Verification.

Replication to the second plea, as to the several t[illegible] passes in the introductory part of that plea mentio[illegible] and therein attempted to be justified — that the de- fendants, at the said time when &c., of their own wro[illegible] and without the cause by them in their said sec[illegible] plea alleged, committed the said several trespasses in [illegible] introductory part of that plea mentioned, in manner [illegible] form &c.: concluding to the country.

The cause was tried before *Parke* B. at the Sum[illegible] assizes for the county of *York* 1837. The facts [illegible] not very clearly ascertained at this trial, but as t[illegible] ultimately appeared at the subsequent trials they [illegible] as follows. The plaintiff *A. Newton*, on the 1st [illegible] *September* 1836, hired of the defendant *Harland*, [illegible] the period of six months, several rooms in a ho[illegible] which *Harland* occupied at *Studley*, near *Ripon*, in [illegible] county of *York*. The six months expired on the 1s[illegible] *March* 1837, and the rent not having been paid, *H[illegible]land* on the following day, and the other defend[illegible] *Bailey* as his assistant, distrained the goods of [illegible] plaintiff *A. Newton*, and Mrs. *Newton* having loc[illegible] the doors of the rooms, and refused to give up the k[illegible] *Harland* employed a blacksmith to pick the locks. In the evening of the same day Mrs. *Newton* was reques[illegible] to quit the premises, and having refused, *Harland* ag[illegible] entered the rooms, accompanied by four or five perso[illegible] and compelled Mrs. *Newton* and her children a[illegible] servants to leave the apartments, *Harland* himself layi[illegible] hold of Mrs. *Newton*'s arm, and leading her out.

Upon the facts as proved at the first trial, *Parke* B. told the jury that the second plea was made out, a[illegible] directed them to find the issue raised by that plea for the defendants. The jury having, in pursuance of [illegible] direction, found their verdict on the second issue for the defendants,

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Wilde Serjt., in *Michaelmas* term, 1837, obtained a rule for a new trial on the ground of misdirection, contending that the evidence given in support of the second plea established no justification in respect of the assault, and that the fact of the plaintiff *A. Newton* being in possession of the premises having been admitted by the distress, the defendant *Harland* was guilty of an indictable offence in forcibly expelling Mrs. *Newton* and her family from the apartments. He cited the *5 Ric. 2. stat.* 1. *c.* 8., *Comyns's Dig. Forceable Entry*, (A. 2.), and *Hillary* v. *Gay* (*a*); distinguishing the present case from *Taunton* v. *Costar* (*b*). and *Turner* v. *Meymott.* (*c*)

Alexander and *Tomlinson*, in the following *Easter* term, shewed cause. They submitted that the defendant *Harland* was lawfully entitled to the possession of the premises, and that he was justified in what he had done, having used no unnecessary violence. They cited *The King* v. *Oakley* (*d*), *The King* v. *Wilson* (*e*), *Hawkins, P. C.* 64. s. 3., *Taunton* v. *Costar*, *Turner* v. *Meymott*, *Butcher* v. *Butcher* (*g*), *Taylor* v. *Cole* (*h*), *Rogers* v. *Pitcher.* (*i*)

They also contended that the replication *de injuriâ* did not put in issue the lawfulness of the possession, and that the plaintiffs should have replied the demise—citing *Crogate's Case* (*k*), *Selwyn's Nisi Prius*, 8th ed. p. 1349., *Taylor* v. *Smith* (*l*), and *Bardons* v. *Selby.* (*m*)

TINDAL C. J. This case involves an important question, namely, whether a landlord has a right to enter

(*a*) 6 *C. & P.* 284.
(*b*) 7 *T. R.* 431.
(*c*) 1 *Bingh.* 158.; 7 *Moore*, 574.
(*d*) 4 *B. & Ad.* 307.; 1 *N. & M.* 58.
(*e*) 3 *Ad. & El.* 817.; 3 *N. & M.* 753.
(*g*) 7 *B. & C.* 399.; 1 *M. & R.* 220.; and see the notes to the latter report.
(*h*) 3 *T. R.* 292.
(*i*) 6 *Taunt.* 207.
(*k*) 8 *Co. Rep.* 67.
(*l*) 7 *Taunt.* 156.
(*m*) 9 *Bingh.* 756.; 3 *M. & Scott*, 280.

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and expel by force a tenant who holds over after his term has expired. I should have great difficulty in agreeing to the affirmative of that proposition, for I do not see how the defendants can justify the expulsion of the female plaintiff under a possession obtained by an act which in itself is criminal. It seems to me that the cause must go down again to a new trial, in order that the facts with respect to the time and the manner of the entry by the defendants may be more precisely ascertained, and the matter placed in such a shape as will enable either party, if so advised, to obtain the judgment of a court of error upon the point.

PARK and BOSANQUET JJ., concurred.

COLTMAN J. I express no opinion on the ma[illegible] point, but I think that the parties should not be co[illegible] cluded by the judgment of this court.

Rule absolu[illegible]

The cause was again tried before *Alderson* B. at [illegible] *Yorkshire* Summer assizes, 1838. The facts havi[illegible] been given in evidence, and *Hillary* v. *Gay* [illegible] cited on the part of the plaintiffs, the learned Bar[illegible] told the jury that the question of justification was mixed question of law and fact; that where a part o[illegible] house is let for a certain period, and the tenant refus[illegible] to quit at the expiration of the term, his licence to r[illegible] main ceases, and the landlord is entitled to turn hi[illegible] out, using no unnecessary violence. That, with respe[illegible] to the second issue, the questions for the jury to con[illegible] sider were, whether the apartments had been hired b[illegible] the plaintiff *A. Newton* for a certain term which ha[illegible] expired, and whether Mrs. *Newton*, on being require[illegible]

(*a*) 6 *C. & P.* 284.

t, had refused to do so. The learned baron said if these facts were made out to their satisfaction, must find for the defendants on the second issue; st the Court of Common Pleas should not agree inion with him, his lordship directed the jury to the damages upon that issue contingently.

e jury returned their verdict for the plaintiffs on rst issue, and for the defendants on the second, hey assessed the contingent damages at 100*l.* The el for the defendants, however, objected that the ges could not be so assessed without their consent, upon the associate entered the verdict without the ment of damages.

rren, in *Michaelmas* term, 1838, in pursuance of reserved to him at the trial, moved to enter a ct for the plaintiffs on the second issue for the ges assessed by the jury, or for a new trial on the nd of misdirection. The Court refused a rule to a verdict for the plaintiff on the second issue for damages contingently assessed, as the defendants not consented to the assessment; but granted a for a new trial, against which

esswell, *Alexander*, and *Tomlinson*, in *Trinity* term , shewed cause. They submitted, as on the pre- s argument, that the plaintiff *A. Newton*'s term ng expired, the defendant *Harland* had a right to possession of the apartments; and that, having en- l and taken the actual possession, he was justified pelling Mrs. *Newton* as a trespasser in the manner he had done.

Warren, in support of his rule, contended that the y of the defendants to take possession amounted in to a forcible entry; *Viner's Abridg. Forc. Entry*, A.,

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Bacon's Abridg. Forcible Entry (B.); 5 *Ric.* 2. *stat.* 1. *c.* 8., 15 *Ric.* 2. *c.* 2., 3 *Comm.* 179. That a legal possession cannot be derived out of, or constituted by, an illegal act; citing the judgments of Lord *Ellenborough* C. J. and *Le Blanc* J. in *Langton* v. *Hughes* (*a*), that of *Holt* C. J. in *Bartlett* v. *Vinor* (*b*), and the cases of *De Begnis* v. *Armistead* (*c*), and *Cope* v. *Rowlands.* (*d*) He referred to *Taylor* v. *Cole* (*e*), *Taunton* v. *Costar* (*f*), *Rogers* v. *Pitcher* (*h*), *Doe dem. Hanley* v. *Wood* (*i*), *Turner* v. *Meymott* (*k*), *Butcher* v. *Butcher* (*l*), *Wildbore* v. *Rainsforth* (*m*), and *Lacey* v. *Lear* (*n*), as establishing no more than, first, that the party entered upon, whose term had expired, could not maintain trespass *quare clausum fregit* against his landlord; and, secondly, that the landlord might resume possession, if he could obtain it peaceably, but not otherwise. He submitted that no case had gone so far as to justify a landlord in committing an assault in retaking possession. He also referred to *Hillary* v. *Gay* (*o*) as not being so strong a case as the present, and to the judgments of *Tindal* C. J. in *Anthony* v. *Harvey* (*p*), and of *Patteson* J. in *Doe d.* *Stevens* v. *Lord.* (*q*)

Newton followed on the same side.

The Court, which was composed of *Tindal* C. J. and *Vaughan*, *Coltman*, and *Erskine* Js., took time to consider; but Mr. Justice *Vaughan* dying, and Mr. Justice *Coltman* differing in opinion from the Lord Chief Justice and Mr. Justice *Erskine*, the Court desired that the

(*a*) 1 *M.* & *S.* 596, 597.
(*b*) *Carth.* 252.
(*c*) 10 *Bingh.* 107.
(*d*) 2 *M.* & *W.* 149.
(*e*) 3 *T. R.* 295.
(*f*) 7 *T. R.* 431.
(*h*) 6 *Taunt.* 202.
(*i*) 2 *B.* & *Ald.* 724.
(*k*) 1 *Bingh.* 138.
(*l*) 7 *B.* & *C.* 399.
(*m*) 8 *B.* & *C.* 6.; 2 *M.* & *R.* 185.
(*n*) *Peake's Addit. Cas.* 210.
(*o*) 6 *C.* & *P.* 284.
(*p*) 8 *Bingh.* 186.; 1 *M.* & *Sc.* 300.
(*q*) 7 *A.* & *E.* 610.; 2 *N.* & *P.* 604.; 6 *Dowl. P. C.* 256.

case might be re-argued. It was accordingly again argued in *Easter* term last, before *Tindal* C. J., and *Bosanquet*, *Coltman*, and *Erskine* Js.

Tomlinson, for the defendants. Although the distress for the rent on the morning of the 2d of *March*, under the 8 *Anne*, *c.* 14. *ss.* 6, 7. (*a*) affirmed the continuance of the plaintiffs' possession *de facto* up to that time, it did not affirm the continuance of the tenancy, which ceased under the agreement on the previous day. The possession of the plaintiffs terminated altogether when the distress was completed, and this was accomplished some time before the transaction took place, out of which the present action arose. The defendant *Harland* was therefore justified in treating Mrs. *Newton* as a trespasser, and in opening the doors which she had locked; for he had, at all events, the actual and legal possession of the rest of the house. In *Lee* v. *Gansel* (*b*) it was held that a bailiff in execution of *mesne process* may break open the door of a lodger's apartment, having first gained peaceable entrance at the outer door of the house. Lord *Mansfield* there distinguished between inner and outer

(*a*) The sixth section of the statute, after reciting that "Whereas tenants *pur autre vie*, and lessees for years or at will, frequently hold over the tenements to them demised after the determination of such leases; and whereas after the determination of such or any other leases, no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof," enacts that "it shall and may be lawful for any person or persons having any rent in arrear, or due upon any lease for life or lives, or for years or at will, ended or determined, to distrain for such arrears after the determination of the said respective leases in the same manner as they might have done if such lease or leases had not been ended or determined." "Provided (sect. 7.) that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

(*b*) *Cowp.* 1.

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ue upon a title equally lawful, unless the owner of d by some public and avowed act, such as entry is, :clare his continuance to be *tortious*, or in common ge, wrongful." In *Doe dem. Hanley* v. *Wood* (*a*), certain acts were held to amount to a re-entry by :antor, inasmuch as unless referred to the ex- of that right, they would be acts of trespass by *Abbott* C. J., in delivering the judgment of the , says, "In *Plowden*, 92., it appears that if a person ; a right of entry, has done any act so that the ee might have an action against him if he was a er, the law saith that rather than he shall be ed it shall be an entry and remitter to him." esult of the authorities is, that no formal mode of ry is necessary; but where a landlord does any shall be referred to his right to re-enter, and he be held justified. In *Taylor* v. *Cole* (*b*) Lord n said, "It is true that persons having only a are not to assert that right by force; if any vio- be used, it becomes the subject of a criminal pro- on; * * *. But this is not a criminal prosecu- and the question is, whether a person having a of possession, may not peaceably assert it, if he t transgress the laws of his country. I think he for a person who has a right of entry may enter ably, and, being in possession, may retain it, and that it is his soil and freehold." And *Ashurst* J. 'No person who has a right of entry into lands e considered as a trespasser for asserting that unless it be attended with such acts of violence as ubject him to a criminal prosecution." [*Tin-* . J. That case shews that no action of trespass *clausum fregit* can be maintained by a party whose determined. You call upon us to go a step fur-

(*a*) 2 *B. & Ald.* 724. (*b*) 3 *T. R.* 292.

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after the determination of his term, could not dis- the landlord's cattle which had been put upon the ises by way of taking possession. *Turner* v. *Mey-* (*a*) and *Butcher* v. *Butcher* (*b*) are also authorities ew that a landlord is justified in entering under mstances similar to those in the present case, and no particular mode of entry is requisite. *Hillary* y is the only case that is opposed to those deci- ; and there it is evident that great violence must been used. Lord *Lyndhurst* appears also not to been reminded of the statute of 8 *Anne*, *c.* 14. 7., and to have assumed that the distress subse- ly made was an acknowledgment of a new tenancy. fact of the defendant's acquiescence in the ruling s lordship may be accounted for by the defect in stification pleaded. On the whole it is submitted ere the defendants' justification was made out, and he direction of the learned Baron was proper, and quently the verdict of the jury ought not to be bed.

ton, in support of the rule. The second plea l no question of title, but merely says that the dant *Harland* was lawfully possessed of the pre- . *De injuriâ* is therefore the proper replication; traverses that fact, and in doing so traverses the er in which the possession was regained. The ion is, was *Harland* lawfully possessed of the pre- at the time when the assault was committed? ase has been cited in which it has been decided landlord is entitled, without action, to resume ssion after the expiration of the lease; and the dant cannot set up his title as a defence to an

(*a*) 1 *Bingh.* 158.; 7 *Moore*, 7 *B.* & *C.* 399.; and see notes to *S.C.*, reported 1 *Mann.* & *R.* 220.

order to execute a *fieri facias*, and were afterwards, as agent to the landlord, to turn a lodger out of his apartment, the officer might be indicted for a forcible entry. *Sir Moil Finche's* case (*a*) is an authority to shew that the proper mode of regaining possession is by ejectment, which action was invented to avoid personal collisionb etween the contending parties. The right of a landlord to make an entry is not for the purpose of ousting a tenant by sufferance, but to enable him to bring his action. In the sentence immediately following the passage that has been read from *Blackstone* with respect to estates at sufferance, the learned commentator says (*b*), "Thus stands the law with regard to tenants by sufferance, and landlords are obliged in these cases to make formal entries upon their lands, and recover possession by the legal process of ejectment." Since the remedies given to landlords by the 4 *G.* 2. *c.* 28. and the 11 *G.* 2. *c.* 19., enabling them to recover double value or double rent against tenants holding over, there is less reason than ever for allowing the former to resort to forcible means of regaining possession. The practice of taking possession of lands without legal authority was reprobated in *Stephens* v. *Lord.* (*c*) It is submitted, in conclusion, that as justices acting under statutes against forcible entries are not to investigate the titles of the respective parties, and as, on an indictment for a forcible entry, the jury can only inquire into the force used; so in the present case, where an assault is complained of, and the defendant *Harland* pleads that he was lawfully possessed of the premises when the assault was committed, the substantial question to be determined is, not whether the defendant has title to the premises, but whether he

(*a*) 2 *Leon.* 134.
(*b*) 2 *Comm.* 150.
(*c*) 7 *A.* & *E.* 610.; 2 *N.* & *P.* 604.; 6 *Dowl. P. C.* 256.

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e of the defendants was *lawfully in possession* at the ne the assault was committed, is negatived.

In the present case the defendant *Harland*, accom- anied with five other men, entered into the apartments hich had been in the plaintiff's occupation, whilst his ife still remained in possession, under circumstances hich, at least, leave it as a question for the jury to deter- ine, with proper directions from the judge at the trial of he cause, whether such entry was forcible or not. The se, indeed, was sent down by the court to a second ial for the express purpose of the jury finding this oint, either in the negative or the affirmative. The oint, however, has not been left to them; and I think, on this ground, without entering into any discussion the question to which I have above adverted, on hich I forbear at present to state my opinion, that the se should go down to another trial.

BOSANQUET J. I agree with my Lord Chief Justice thinking that a new trial ought to be granted in this se. Some things are clear. If a tenant hold over the id after the expiration of his term, he cannot treat e lessor who enters peaceably as a trespasser; and e lessor, in such case, may justify his own entry on the land by virtue of his title to the posses- on: *Taylor* v. *Cole* (*a*), *Taunton* v. *Costar*. (*b*) On ie other hand, the lessor, who is out of possession, annot maintain an action of trespass against the tenant olding over. He must first acquire a lawful posses- ion before he can maintain such action. But if the lessor enter upon the land to take possession, he may treat as trespassers all those who afterwards come upon it, *Hey* v. *Moorhouse* (*c*), or who, having unlawfully taken possession, wrongfully continue upon the land,

(*a*) 3 *T. R.* 295.
(*b*) 7 *T. R.* 431.
(*c*) 6 *New Cases*, 52., 8 *Scott*, 156.

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as in the case of *Butcher* v. *Butcher* (*a*), where the defendant had come into possession of the land by invasion, and the rightful owner, having entered, was entitled to maintain an action of trespass against him.

The lessor may even break and enter a house, provided it be empty, which has been occupied and let over by his tenant, though the tenant may have left some of his property therein: *Turner* v. *Meymott* (*b*). But no case has yet been decided in which the lessor has been held to be justified in expelling by force from a dwelling house a person who, having lawfully come into possession of it, has merely continued to hold possession after the expiration of his title.

The lessor who is entitled to possession may acquire such possession by lawful entry; but entry by force is not lawful. Such entry is expressly prohibited by the statute 5 *Rich.* 2. *c.* 7., even where entry is given by law: "The king defendeth that none shall make entry on lands and tenements but in cases where entry is given by law; *and in that case* not with *strong hand* nor with multitude of people, but only in a peaceable and easy manner." And in *Bacon's Abr. Forceable Entry*, (B.), it is laid down that, if a man enter peaceably into a house, but turns the party out of possession by force, or by threats frighten him out of possession, this is a forcible entry. It was said in one case by Lord *Kenyon*, *Taunton* v. *Costar* (*c*), that if the party had entered and expelled the tenant by force, he might have been indicted for a forcible entry; from which it seems to have been supposed that the entry was valid, though the party entering might be indicted for it. But if the act be expressly prohibited by statute, it must, I apprehend, be illegal and void. The case before Lord *Kenyon* was not a case of force; and his expressions in a former case

(*a*) 7 *B.* & *C.* 402. 1 *M.* & *R.* 220.

(*b*) 1 *Bingh.* 158. 7 *Moore*, 574.

(*c*) 7 *T. R.* 431.

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erson having right of possession may *peace-*
it if he does not transgress the law of his
He may enter peaceably and retain it, and
um tenementum" : *Taylor* v. *Cole.* (*a*) If the
: with a strong hand, his act is unlawful, and
as it seems to me, acquire lawful possession
wful act.

an action for assault and battery. The de-
rland justifies his act upon the ground that
ully in possession; that the plaintiff Mrs. *New-*
the premises, was required to go away, and
iereupon he removed her in defence of his
using no more force than was necessary. To
iis plea the defendants must be prepared to
the defendant *Harland* had lawfully acquired
which, from the reason already stated, I
id not, if force was employed to obtain it.
nion of Lord *Lyndhurst*, in the case of *Hilary*
appears to me to be in point. That was an
respass for breaking and entering a room of
f's, being parcel of a dwelling-house. At the
eared that the house belonged to the defend-
iad let it to a person named *Jury*, who had
part of it to the plaintiff; that *Jury* was
ce to quit at *Midsummer*, 1833, but that the
l not quit at that time, and the defendant had
distrained his goods for the rent due up to
. The defendant procured a number of Irish-
to the house, and, after getting the plaintiff to
sending a boy to tell him that he was wanted
ter, the Irishmen entered the plaintiff's room
his wife into the street, and put his furniture
window. Lord *Lyndhurst* held (*c*), that the
the defendant could not be justified.

(*a*) *R.* 295. (*c*) At *Nisi Prius.*
ar. & P. 284.

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iestions were, whether the rooms were let in term, whether the term was over, and, if the plaintiff, when required, would not go at was proved, he said, the verdict in law the defendant.

ection appears to me to be incorrect, and ought therefore to be a new trial.

v J. Having the misfortune in this case to the rest of the court, it is right that I should ounds of my opinion; but as the case will go rial, and the question may be raised in a l way on the record, it will be sufficient to very briefly.

of *England* recognises two modes of asserting lands wrongfully withheld, — by entry and

ses by which the remedy by entry was allowed, se the phrase so familiarly met with in our the entry is congeable, the remedy by entry upon as favourably as the remedy by action. of such an entry is, that it gives a man uts into immediate possession him that has ry on the estate, and thereby makes him com-: 3 *Bla. Comm.* 176. Agreeably to this, Mr. *yley* said, in the case of *Butcher* v. *Butcher* (*a*), hat a party having the right to the land ac- entry the lawful possession of it, and may espass against any person who, being in pos- he time of the entry, wrongfully continues on

t aware that any doubt exists, that after the e, he may turn any ordinary trespasser off and I am unable to see any principle which event him from treating his tenant at suffer-

(*a*) 7 *B. & C.* 399.

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ance in the same way, for such a tenant is a mere wrongdoer: *Co. Litt.* 57 b., *Pike and Hassen's* case(*a*), *Sir Moil Finche's* case. (*b*)

But it is said that a person who has a right of entry ought to enter peaceably. The true doctrine on this subject is stated, as I apprehend, correctly, in the case of *Taylor* v. *Cole* (*c*), where it is said: "It is true, persons having only a right are not to assert that right by force; if any violence is used it becomes the subject of a criminal prosecution." So, in *Taunton* v. *Costar* (*d*), it is said: "If the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term."

For the preservation of the peace, the law will punish for the forcible entry; but the tenant at sufferance being himself a wrongdoer, ought not to be heard to complain in a civil action for that which is the result of his own misconduct and injustice.

The distinction between the civil rights of a person forcibly turned out of the possession of land, and the penal sanctions by which he is protected from being forcibly dispossessed, are drawn in a marked way in the cases in our old books relating to the statutes of forcible entry. Although, by those statutes, all forcible entries were prohibited, even by those who had title to enter, yet the party dispossessed could maintain no action on the statutes. This is pointedly laid down in the *Year Book*, 9 *H.* 6. 19., 15 *H.* 7. 17., *F. N. B.* 248 H. (*e*)

On these grounds I am of opinion that, although the defendant, if guilty of a forcible entry, is responsible for it in the way of a criminal prosecution, yet that,

(*a*) 3 *Leon.* 233.
(*b*) 2 *Leon.* 143.
(*c*) 3 *T. R.* 295.
(*d*) 7 *T. R.* 431.
(*e*) *Vide post*, 669. (*a*).

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ast the plaintiffs, who are wrongdoers, and alto-
er without title, he has obtained by his entry a
al possession, and may justify in a civil action the
owing them, in like manner as in the case of any
r trespasser.

ERSKINE J. The nature of the question under con-
ration, and the circumstances out of which it has
n, have been already so fully stated that it will not
ecessary for me to preface my opinion by any repe-
n of them.

agree with my Lord and my Brother *Bosanquet* in
ding that there was evidence in the case from which
ury might have drawn the conclusion that the de-
ant had obtained and kept possession of the apart-
ts with that degree of force that would constitute a
ble entry and detainer; and therefore that the only
t upon which it is necessary for the court now to
any opinion is, whether the question of force was
erly withheld by the learned judge from the con-
ration of the jury.

fter the best consideration that I have been able to
to the subject, I am strongly inclined to think that,
ne jury had found that the circumstances under
h the defendants entered were such as to constitute,
er the judge's direction upon the law, a forcible
y within the meaning of the statute 5 *R.* 2. *st.* 1.
, or at common law, and that the force that accom-
ed the entry continued down to the time of the assault
plained of, and so that there was no interval during
h the defendant *Harland* could be said to have been
ne peaceable possession of the rooms, that he could
be truly said to have been lawfully possessed of
n, and that the justification, as pleaded, was not
ed. I therefore agree with my Lord and my Bro-
Bosanquet that the cause should go down for an-

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, and the same doctrine is clearly established by ses of *Taylor* v. *Cole* (*a*), *Taunton* v. *Costar* (*b*), v. *Durrant* (*c*), *Turner* v. *Meymott.* (*d*) But then son for this is also given, namely, that the plain- ving no title to the possession as against the d, can have no right of action against him as a ser for entering upon his own land, even with or, although the law had been violated by the de- t, for which he was liable to be punished under a al prosecution, no right of the plaintiff had been ed, and no injury had been sustained by him for he could be entitled to compensation in damages. in the case now before the court the plaintiffs do k to recover damages for any supposed trespass their possession of the rooms; but they seek a nsation for a personal injury, and they deny that fendant had by his entry entitled himself to treat is trespassers.

the 5 *R.* 2. *stat.* 1. *c.* 8., it is enacted, "that none henceforth make any entry into any lands and nts but in case when entry is given by the law, such case with strong hand, nor with multitude ple, but only in peaceable and easy manner." It that the punishment of fine and imprisonment is sly added as the statutable consequence of a vio- of this prohibition. Yet, inasmuch as the act is y prohibited, the act itself is made unlawful, even re not already so at common law; and it seems to erefore, to follow as a consequence that a land- nder the circumstances of this case, though he right of entry, must, in order to reinvest himself he lawful possession of premises held over by his , exercise his right of entry peaceably; and that

) 3 *T. R.* 292.
) 7 *T. R.* 431.
) 8 *T. R.* 403.

(*d*) 1 *Bingh.* 158. 7 *Moore,* 574.

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not guilty, the plaintiffs were entitled to a verdict; and that with respect to the justification pleaded in the second plea, if they were of opinion that the force and violence used by the defendants in obtaining possession were such as to amount to a forcible entry within the meaning of the statutes upon that subject, then the defendant *Harland* could not (according to the opinion of the Court of Common Pleas, by which he the learned judge felt himself bound), be said to have been "lawfully possessed" of the premises in question; and in that case their verdict must be for the plaintiffs.

Creswell, for the defendants, excepted to the above ruling, and handed in a note of exception to the following effect: "That assuming a forcible entry to have been proved, the defendants were still entitled to a verdict upon the plea of justification." (*a*)

The learned judge also gave it to the jury as his opinion that the plaintiffs had not proved so much force and violence as amounted in law to a forcible entry; as, to constitute a forcible entry within the statutes, either the outer door must have been broken open, or

(*a*) The defendants, being unwilling to contest the matter further, afterwards withdrew their bill of exceptions. It has therefore not been decided by a court of the last resort, whether lawful possession necessarily implies possession lawfully acquired, and whether a party who possesses himself violently of his own property is for ever precluded from defending his possession against a wrong doer.

In *T.* 9 *H.* 6, fo. 19, pl. 12., it was held by all the court, that a man ousted *manu forti*, shall not have an action where the entry was congeable, because, for the *manu forti*, the party convicted shall be fined to the king; and that, in an *action* on the statute, the writ shall abate if the words "*ubi ingressus non datur per legem*" are omitted; because, if the entry on the plaintiff be congeable, he has no cause of action. In *H.* 15. *H.* 7, fo. 17, pl. 12., it is said that "the title found with one or against one shall make an end of all; because, if the title be not good, although the defendant entered with force, the plaintiff has no cause of *action;* but in that case he who entered with force shall be indicted and fined, and by this indictment he shall be restored to his possession."

JOHN DOE, on the joint demise of ROBERT WILLIAMS and Eight Others, and on the several demise of JOHN MOSLEY, *v.* JOHN LLOYD.

June 27.

EJECTMENT, brought to recover the possession of dwelling houses and land in *Llanbester* in the county of *Radnor*.

This cause was first tried before *Coleridge* J., at the Spring assizes, at *Presteign*, in 1839, when a verdict was found for the plaintiff, which was set aside on the ground of misdirection. (*a*)

The cause was tried there again before *Gurney* B. at the Summer assizes, 1839. The lessors of the plaintiff made title under a conveyance from the Rev. *David Lloyd*, the late vicar of *Llanbester*, upon whose death the defendant had entered as his heir. By indentures of lease and release, of 3d and 4th *July* 1836, the release being made between the said *David Lloyd* of the first part, the lessors of the plaintiff of the second part, and *Thomas Graham*, *Wesleyan* minister, the superintendent preacher of the circuit in the Methodist

Under the Mortmain Act of 9 *G.* 2. *c.* 36. the production of an indenture having an indorsement which purports to be a memorandum of the inrolment of the indenture in Chancery on a certain day, and to be signed by a party who is shewn to have acted as clerk of the inrolment, though not so designated in the indorsement, is sufficient proof of the inrolment and of the time at which it took place, without proof of the handwriting of the officer signing the memorandum.

The charitable uses to which land is conveyed, may be declared by words of reference to another deed relating to other property.

(*a*) 5 *New Cases*, 741. where is stated that the money supposed to be the purchase money, was returned to two of the trustees; but there appears to have been no evidence to warrant that statement. The money appears to have been given by the testator, was money given by him to two persons, strangers to this transaction, and for a different purpose. And see 8 *Scott*, 93. *S. C.*; *Doe d. Chandler* v. *Ford*, 3 *A. & E.* 649.; 5 *N. & M.* 209.; 1 *Harr. & Wooll.* 378.; *Lord* v. *Wardle*, 3 *New Cases*, 680; 4 *Scott*, 402.

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roof of the inrolment of the deeds of the 3d
y 1836 was insufficient; 2dly. That the re-
to have exhibited the trusts on the face of the
ıot, as here, stated them only by reference to
deed *; 3dly. That the conveyance was not
take effect in possession, for the charitable
l, immediately from the making thereof."
noved for a new trial on the insufficiency of
:; but upon this point no rule was granted.

June 4.

ow shewed cause. The inrolment was suf-
ɔved; *Bull. N. P.* 255. Here, the deed
ɔid without inrolment, by the express pro-
: statute. *Drew* held a double appointment,
ix clerks' office, the other in the inrolment
vas objected that, supposing *Drew* to have
inrolment office at the time of the inquiry,
ıewn he was so at the date of the inrolment.
ment amounted to evidence that he was the
er in 1836. [*Tindal* C. J. They say you
him in the proper office.] *Rex, aux. Reed* v.
2 *Bac. Abr.* 35. (*b*), *Starkie Evid.* 320. (*c*),
ewis v. *Bingham* (*d*), *Kinnersley* v. *Orpe.* (*e*)

'eyance by *Lloyd*
f freehold ground
e of a Methodist
a declaration of
reference to the
ıdel-deed."
ɛnture, made the
in the year of
2, between (the
: first part, and
of the second
B., the superin-
ıer for the time
being of the circuit in the Methodist connection, in which the piece of ground and hereditaments described, are situate, of the third part.

"Whereas the said parties to these presents of the second part, being possessed of certain sums of money, intended to be laid out in the purchase of a piece of ground and hereditaments, and in erecting and building thereon a chapel or

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ice, 495.
ence (F).
ınd 7th edition.

(*d*) 4 *B. & Ald.* 672.
(*e*) 1 *Dougl.* 56.; and see 3 *Mann. & Ryl.* 218. 220. 223.

per (a), *Eagle* v. *Garrick.* (b) [*Maule* J. olment is a condition precedent. *Tindal* C. J. of Charitable Uses (c), in express terms,

rtaining, or with ny part thereof r or at any time used, occupied, intended so to reputed, deem- cnown as part, iber thereof, or reof, with their their appurte- e reversion and ainder and re- ly, and other id profits there- tate, right, title, ince, use, trust, ts, possession, ind whatsoever, d in equity, of (vendor), into, n the said pre- o and out of parcel thereof, every of their to have and to ece or parcel of ge, or tenement, ind all and sin- e premises by granted and re- wise assured or be, with their their appurte- ssession imme- making hereof, any power of ervation, trust, ation, clause, or tsoever, for the aid (vendor), or r persons claim- unto and to the parties hereto of the second part, their heirs and assigns for ever: but, nevertheless, upon such and the same trusts, and to and for such and the same ends, intents, and purposes, and with, under, and subject to, such and the same powers, provisoes, declarations, and agreements, as are expressed, contained, and declared or referred to, in and by a certain indenture of release, bearing date on or about the 3d day of *July* 1832, and made or expressed to be made between *John Sutcliffe, Benjamin Garside, Francis Farnell, John Swallow, Thomas Firth, Robert Wilson, Samuel Nayler, John Fearley Sutcliffe, Charles Swallow, John Swallow* the younger, *Samuel Morley, Joseph Garside,* accountant, *William Farnell,* and *Joseph Garside,* woodturner, therein respectively described of the first part, the Rev. *George Marsden,* therein described, of the second part, and *James Brown,* therein also described, of the third part, and inrolled in His Majesty's High Court of Chancery on the 25th day of *July* 1832, being a deed made for the settlement of a piece or parcel of ground and chapel, or place of religious worship, with the appurtenances, situate at *Skircoat,* in the parish of *Halifax,* and county of *York,* for the use of the people called Methodists, in the connection established by the late Rev. *John Wesley;*

5. (b) 3 *Price*, 516. (c) 9 *G.* 2. *c.* 36.

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Doe dem. Williams v. Lloyd.

ngham (*a*), 1 *Stark. Evid.* 320. (*b*), *Phillipps on* (*c*) This was a statutable conveyance: as such ɔe void unless inrolled. But the deed would ɪnt to pass the estate at common law. They therefore, *primâ facie*, a good conveyance. ɔrsement is only required by statute. . This is an act of the court, and a record of . There was an abundance of proof as to eing the inrolling officer in the evidence of *Maule* J. How do you make out, that the by *Drew* of his own signature was evidence e defendant?]

he second point, the trust was sufficiently de- the reference to the model-deed, which is an t carefully prepared by *Sugden*, *Brodie*, *Bell*, *ley*. In pages 33. and 41. of the model deed ɔy implication, a clear direction that, of what- ɪt the property may be, all shall be absorbed aritable objects indicated in the deed.

June 6.

Vilson, at another day in this term, on the . The defendant has applied, not for a new for a nonsuit, he is therefore bound to satisfy that there was no evidence whatever to go to This being a conveyance for a valuable con- , viz., 490*l.*, it was not necessary to shew that *nyd* survived the transaction for the space of lendar months. *Reece*'s testimony afforded proof of inrolment. It was conceded at the if the words "officer of inrolment" had been would have been sufficient. [*Tindal* C. J. It ceded that the insertion of those words would

B. & Ald. 672. (*c*) Sixth and seventh edi-
:cond edition. tions.

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rpe (*a*) it does not appear that the signature of *;rine Fury*, the party who signed as auditor, was ed; nor was it even shewn that *Fury* was auditor. ie first trial the objection as to the inrolment was aken. If the inrolment was well proved by shewing the deed was inrolled in Chancery in pursuance of ct of parliament, which does not require the inrol- : to be in any particular office, or before any par- ar officer, there is an end of the case.

is objected, that the conveyance was not made to effect immediately in possession. On referring to leed it will be seen that the words which follow the *ndum* are the very words of the statute.

hen it is objected, that it lay on the plaintiff to pro- , and to prove the execution and inrolment of, the el-deed of 1832. But the conveyance to the lessors ie plaintiff, executed by the ancestor of the defend- admits both the execution and inrolment of that in- ment. And a deed was produced, corresponding in espects with the description of the deed referred to as nodel-deed. It formed no part of the plaintiff's case rove the execution of a title deed relating to other erty. As far as the present title is concerned the el-deed is merely a specification of the trusts, &c., the parties to that deed are strangers to the pro- y now sought to be recovered. The model-deed produced from the muniments of the *Wesleyan* ty. It is not necessary to prove the execution of eed which has been inrolled: *Bro. Faits enroll.* 1. (*b*) *Sir T. Holland* v. *Boniss* (*c*) shews that *est factum* could not be *pleaded* to such a deed; it ot, therefore, be necessary to prove its execution 1 deducing title in an action of ejectment; *Lady*

) 1 *Dougl.* 56.
) Citing *P.* 7 *E.* 4, fo. 5, pl. 13, in which that point is distinctly laid down.
(*c*) 3 *Leon*, 175.

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It was proved that, from the time of the execution of the conveyance, *D. Lloyd* paid rent to the trustees. There is no instance in which the want of a declaration of trust has been held to vitiate the conveyance; *Powell on Devises*, by *Jarman*. Upon looking at the trusts of the model-deed, it will be seen that they contain nothing inapplicable to the charitable purposes of the society.

E. V. Williams (with whom was *H. Hill*), in support of the rule. The heir of *D. Lloyd*, the grantor, charged that the lessors of the plaintiff had concocted a plan to obtain possession of this estate. This court sent the case to a second trial on the ground of fraud. The jury, however, having found a verdict for the plaintiff, the defendant, who has unsuccessfully made a charge of fraud, now contends that the machinery resorted to by the lessors of the plaintiff to carry their plan into effect is not applicable. The statute has several distinct objects in view. It was passed, not only to prevent advantage being taken of the weakness of persons in their last moments, but also for the purpose of regulating the declaration of charitable uses, and correcting abuses in the application of the funds destined to such uses; *Attorney-General* v. Lord *Weymouth* (*a*); *Highmore on Mortmain*, 174.; *Attorney-General* v. *Day* (*b*); Queen *Anne*'s Bounty Act. (*c*) The restrictions apply not only to gifts by deed, but also to transactions between vendee and vendor, for a valuable consideration. By the second section the conveyance is not void by the death of the vendor within twelve calendar months. The 9 *G.* 4. *c.* 5., was passed for the purpose of curing defects in previous conveyances, and does not apply to subsequent transactions; and in cases cured by that statute

(*a*) *Ambler*, 20, 7 *Bac. Abr.* 419. sixth and seventh editions.
(*b*) 1 *Vez. Sen.* 218.
(*c*) 2 & 3 *Ann. c.* 11.

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ment, inasmuch as there was an outstanding term of 500 years. [*Matthews.* That term is merged, being conveyed to the same parties as were entitled to the fee.] The cases referred to by Mr. *Wilson* apply to personal property; as to real estate the rule is different.

Secondly; was the inrolment properly proved? The inrolment was part of the plaintiff's case. *Doe* v. *Bingham* (*a*) is distinguishable; The annuity acts do not prohibit the conveyance of lands to secure the payment of annuities. *Doe* v. *Mason* (*b*), which was a decision on 17 G. 3. *c.* 26., and *Doe* v. *Bingham*, which was on 53 G. 3. *c.* 140., must be assumed to be good law. But, on referring to the judgments of *Bayley* J. and *Holroyd* J., the latter case will be found not to govern the present. Looking at the 9 *G. c.* 36., in connection with the statute of uses (*c*), it will be seen that conveyances for charitable uses must be by bargain and sale. It is impossible to distinguish between those two statutes. The inrolment must be proved on the part of the plaintiff, like any other fact necessary to complete the title of his lessors. The indorsement on the conveyance of 1836 is not "inrolled by me," or "inrolled in my office," but merely "inrolled in the High Court of Chancery." Much of the conversation between *Reece* and *Drew* was not evidence.

Cur. adv. vult.

Tindal C. J. now delivered the judgment of the court. In this ejectment the question which arose at the trial was, whether the inrolment of the indentures of lease and release of the 3d and 4th of *July* 1836, was proved by legal evidence; for the conveyance being made in trust for the *Wesleyan* Methodists, was, strictly and properly, a conveyance to charitable uses; and, therefore, under the 9 *G.* 2. *c.* 36., no interest in the

678 (*a*) 4 *B. & Ald.* 672. *suprà*, 678. (*b*) 3 *Campb.* 7. *suprà*, 678 (*c*) 27 *H.* 8. *c.* 16.

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: of the fine, he being appointed to give out copies
: agreements between the parties which are entered
cord: *Gilb. Evid.* 21. (*a*) And upon inquiry,
1 we have caused to be made by the officers of our
as to the practice in the Inrolment Office of the
t of Chancery (an inquiry which was made upon
uthority of the case of *Worsley* v. *Filisker* (*b*), re-
l to in the argument), it has been certified to us to
e invariable practice that the officer, at the time of
ng the inrolment, delivers back to the party the
ıal deed, with the certificate of inrolment indorsed
on, in the same form as the present memorandum.
ıe case of *Kinnersley* v. *Orpe* (*c*) is a strong con-
tion of the sufficiency of the evidence of the inrol-
. In that case it was held, that a memorandum of
ırolment on the margin of a lease of lands within
luchy of *Lancaster* (*d*), signed "*A. B.* auditor,"
ıufficient proof of the act of inrolment, even in
r of the lessee under the duchy. (*e*) And the case
put by *Buller* J. appears decisive of the present
: "I cannot distinguish," he says, "this case
that of a bargain and sale. The act of parliament
ıt case does not provide that the indorsement by
ıfficer shall be evidence of the inrolment, and yet
ıonstantly admitted." And neither in the case of
ersley v. *Orpe*, nor in the case put by *Buller* J.,
it appear that proof of the handwriting of the
r was held necessary: it was treated as an official
We therefore think the proof of the inrolment
be held sufficient; and, if so, then the second
tion which has been made, viz., that the inrolment
ı model-deed, as it is called, was not proved, falls
ı ground; for that deed was inrolled in the same

And see *Plowd.* 110. *b.*; *Abr. Evidence* (F). 2 *Roll. Rep.* 119.

(*c*) 1 *Dougl.* 56.
(*d*) *Suprà*, 583, 589. n.
(*e*) *Acc.* 3 *Mann. & Ryl.* 223.

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: about the month of *March* 1839, and for interest on, from the receipt thereof to the day of pay-

eas: first, *non-assumpsit*; secondly, that the plain- were not, nor are, assignees of the estate and effects e said *Francis Leete*, a bankrupt, in manner and as the plaintiffs have alleged.

ith this plea the following notice was given: —

In the Common Pleas. — Between *George Porter William Turquand*, assignees of the estate and effects rancis *Leete*, a bankrupt, plaintiffs, and *John* er, defendant.

I hereby give you notice that I dispute the act of ruptcy upon which the above-named *Francis Leete* declared a bankrupt, and in which bankruptcy the e-named plaintiffs were chosen assignees. And I er give you notice that the plaintiffs will be held nsible for all acts or doings whatsoever at their

Dated the 2d day of *January* 1840.

Messrs. *Brooksbank* and *Farn*, plaintiff's attorneys or agents.

Yours, &c.
James Sawyer,
Defendant's attorney,
3. *Bow Lane, Cheapside.*"

the trial before *Littledale* J. at the last assizes for ounty of *Essex*, the following facts appeared.

the 21st of *February* 1839, *Leete*, who kept the n *Inn* at *Chipping Ongar*, executed an assignment s furniture and other effects there, except the stock de, which *Leete* continued to use, his ready money book debts, to the defendant (to whom he was in- d in 39*l.* 10*s.*, borrowed in *December* 1838), in to sell and to pay his own debts, and return the us to *Leete*. The sale took place in *March*, and ıced 293*l.* 11*s.* 7*d.*; the fiat issued in *April* 1839. vidence was given of a petitioning creditor's debt.

ı the part of the defendant, it was contended that

efore be desirable that this point should be further sidered, independently of the question whether the ct of the second plea is to render any further notice ecessary. A rule *nisi* having been granted,

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Platt (with whom were *Thesiger* and *Petersdorff*,) now wed cause. This case turns upon the legal opera- n of the fortieth section of 6 *G.* 4. *c.* 16., by which it enacted, "that in any action by or against any as- nee, or in any action against any commissioner, &c., proof shall be required at the trial, of the petitioning editor's debt or debts, or of the trading or act or ts of bankruptcy *respectively*, unless the other party such action shall, if defendant, at or before pleading, if plaintiff, before issue joined, give notice in writ- g to such assignee, commissioner, &c., that he in- nds to dispute some, and which, of such matters." he object of the legislature was to lessen the proof at trial, by confining it to the real matters in dispute tween the parties. The trading, the petitioning cre- or's debt, and the act of bankruptcy, are to be taken be admitted, unless specific notice be given to dispute em. [*Tindal* C. J. That is undoubtedly so, with re- ect to the title of the assignees to sue; but you would rry it further, and would make the absence of notice admission of a petitioning creditor's debt subsisting at y time at which the plaintiffs may be able to prove an t of bankruptcy.] If the plaintiffs were bound to ove a petitioning creditor's debt subsisting on the st of *February*, they might have been called upon to ove that *Leete* was at that time a trader. In *Trimley Uwin* (*a*), a notice "to dispute the bankruptcy" nerally, was held to be insufficient, and a nonsuit for

(*a*) 6 *B.* & *C.* 537.; and see *S. C. per nom. Trimleys* v. *Uwins*, D. & *R.* 548.

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Channell Serjt. (with whom was *James*) in support of e rule. The only difficulty in this case is raised by e conflicting opinions expressed by Lord *Tenterden* and rke J., and by *Bayley* and *Littledale* JJ., in *Norman* v. oth. (*a*) Under the second plea upon this record, the iintiffs have been called upon to prove merely what e notice requires; though in *Butler* v. *Hobson* (*b*), this urt held that a plea, that the plaintiff was not ignee, put in issue the petitioning creditor's debt d the act of bankruptcy. There, not only the plea t the notice also, impugned the petitioning creditor's bt and the act of bankruptcy. But in *Scott* v. omas (*c*) no such notice appears to have been given. ie present case is to be looked at as if the plea non assumpsit alone had stood upon the record. ie promise in the declaration, which that plea puts in ue, is in respect of money had and received by the fendant *after the bankruptcy*. If the plaintiff had ed for money had and received before the bankruptcy, e defendant might have pleaded a set-off. (*d*) Upon is issue it lay upon the plaintiffs to shew that money ad been received by the defendant after the bank- uptcy. The *fiat* was in *April*: the sale took place on he 16th of *March*, and the proceeds of the sale came nto the hands of the defendant on the 18th of *March*.

The act of bankruptcy was committed on the 21st of *February*, and it is not contended that it is not neces- sary that a good petitioning creditor's debt should have existed at that time; but no proof is offered of the exist-

(*a*) *Suprà*, 688.

(*b*) *Ibid.*

(*c*) In that case it appears o have been assumed without liscussion, that under the plea raversing that the plaintiff was ssignee the plaintiff was bound o shew a good title as assignee, *in omnibus*; and the only ques- tion raised was, whether the proof given of the petitioning creditor's debt, and the act of bankruptcy were sufficient. 6 *Carr. & P.* 611.

(*d*) As to which see *Wood* v. *Smith*, 4 *M. & W.* 525.

to that suggestion is, that it should have been
iat the *fiat* had been taken out upon some other
ınkruptcy. In the absence of such proof, we
ɛsume that the act of bankruptcy proved was
upon which the *fiat* proceeded. I think this
ht to be discharged.

ɴQUET J. I am of the same opinion. The
the plaintiffs to sue as assignees is contro-
y the plea. It was therefore incumbent on the
to shew a title in themselves to sue in that
. In that title three ingredients are required,
ʒ, a sufficient petitioning creditor's debt, and an
ınkruptcy. The statute requires notice to be
ɪtinguishing between these three ingredients of
kruptcy. They are treated as three distinct
each of which is to be considered as admitted,
pecifically made the subject of a notice to dis-
ı the present case no notice being given, except
to dispute the act of bankruptcy, I think the
ɪt must be taken to have admitted that there
fficient trading and a sufficient petitioning cre-
ebt. The notice is given in the act.
ontended that there can be no act of bankruptcy
for the purpose of supporting a commission,
be shewn that there was a trading and peti-
ɔreditor's debt coexistent with the act of bank-
If more acts of bankruptcy than one had ap-
n evidence, the question might have assumed
ɪnt aspect; but where one act of bankruptcy
hewn, that I think must be taken to be the act
uptcy under which the bankruptcy proceeded,
ɛr which the assignees claim.

ɪAN J. In *Norman* v. *Booth* the court was
livided; but since that case, my brother *Little-*

itor's debt could be required, though it is clear the existence of both was necessary to support the

Rule discharged. (a)

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(a) And see *Moon* v. *Raphael*, 7 *C. & P.* 115.

ES THOMAS, Gent., One, &c. *v.* HARRIES, LEWIS, and DAVIES.

EPLEVIN, for cattle and horses taken on the 30th *September* 1839, in the parish of *Llandilofaur*, in county of *Carmarthen*, in a close called *Caecarreg*. defendant *Harries* avowed, and the defendants *is* and *Davies*, as his bailiffs, made cognizance, in form given by 11 *G.* 2. *c.* 19. *s.* 22., for 75*l.* for year's rent due on the 29th of *September* 1839, upon emise to *Evan Thomas*, averring that the distress taken within six calendar months after the 29th *ptember*, and during the continuance of the title of *rics*, and the possession of the plaintiff.

lea in bar: that after the taking of the said cattle and es in the said close, in which, &c., and before the ounding of the same, to wit, on the same day and in the said declaration mentioned, the plaintiff ered and offered to pay the defendant *Lewis*, then g the bailiff of the defendant *Harris*, and by him authorized to receive the said rent, and to make the distress, the said sum of 75*l.* so due for rent, as in said avowry and cognizance mentioned, together

Cattle being distrained, the distrainor leaves a note, stating their number, with the distrainee, and on the following morning delivers to the distrainee a notice of distress, in which he states that he has distrained upon the cattle, and has "impounded them in the place or places hereunder mentioned," which notice concludes thus, "An inventory of the cattle &c.,

ained upon, *and the same are impounded upon the premises*:" Held, that unding was complete as against a tender subsequent to the notice; *Gaselee*, *hus Bosanquet* and *Erskine* JJ., *Maule* J. *dissentiente*.

dlord, *John Hill Harries*, Esq., distrained upon
l goods, cattle, chattels, and effects hereinafter
sed, *and have impounded them in the place*
ereunder also mentioned, for the sum of 75*l.*
: and arrears of rent due from you to him at
s last, for all that messuage, tenement, farm,
with the appurtenances which you hold under
te, lying, and being in the parish of *Llandi-*
the county of *Carmarthen*; and unless you
aid rent due, together with the costs and
distraining for the same, or replevy the same
tle, chattels, and effects mentioned in the said
I shall, at the expiration of five days from the
of, make sale thereof, according to the direc-
e act of parliament. Yours, &c.

J. Davies."

the 30th day of *September* 1839.

nventory of the goods, cattle, chattels, and
trained upon; *and the same are impounded on*
es.

eifers, one bull, four cows, six bullocks, three

remained on the premises until the 2d of *Oc-*
n he was relieved by one *Hughes*, who con-
ere till the 3d. On the 2d the goods were
On the evening of the 1st of *October*, 75*l.* was
o *Lewis* with 1*l.* 13*s.* for the costs of the dis-
ch *Lewis* refused to accept, requiring 4*l.* 10*s.*
sts. For the defendant it was contended that
came too late, and that what had taken place
h of *September*, and on the 1st of *October*, before
, amounted to an impounding of the distress
emises, under the authority of 11 *G.* 2. *c.* 19.
d *Washborn* v. *Black* (*a*) and *Childe* v. *Cham-*

(*a*) 11 *East*, 405.

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: made in the law as to what should constitute an unding, by the statute permitting landlords to im- d upon the premises. The act uses the word "im- ding" as synonymous with "securing." It does not leaving the goods just where they were found. In *born* v. *Black* (*a*), the plaintiff declared in trespass ıtering his house and taking his goods. Upon issue d on a plea of "not guilty," it appeared that a dis- being taken, a man was left in possession till the fifth when the goods were replevied. During the five the man in possession went into different parts of ıouse. It was contended that he was a trespasser, :hat he ought either to have put the goods into one ı and kept possession of that only, or to have re- ɜd them out of the house. Lord *Mansfield* admitted *the strict law was so*, and said that the man might, had pleased, have stript every room and put all the s together, and by that means have greatly dam- them; but that, instead of doing that, he had acted ıe benefit of the plaintiff and left the goods as he ł them; therefore he should leave it to the jury to .der, whether the plaintiff did not consent; and slight evidence of consent the jury found for the ıdant. If the mere leaving the goods where they had been considered by the court, in *Washborn* v. *k*, as amounting to an impounding, no consent on part of the plaintiff would have been necessary. ɔosing the cattle taken to be the cattle of a stranger, as indeed the case here, and the stranger to come ıext day and drive away the cattle, could it be said he would be guilty of a pound breach? In *Swan he Earl of Falmouth* (*b*) the question was a ques-

) 11 *East*, 405. *n.* The dant in that case pleaded bly the general issue, un- which he might give li- cence in evidence by virtue of 11 *G.* 2. *c.* 19. *s.* 21.

(*b*) 8 *B. & C.* 456., and 2 *M. & R.* 534.

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." (a) Before the 11 *G.* 2. *c.* 19. it was not neces- that the impounding should be in any specific . That statute certainly creates considerable diffi- [*Bosanquet* J. Can the tenant be ousted of his of tender by allowing no interval of time between listraining and the impounding?] The inconve- : to the tenant might have been as great at common Had the landlord's own field adjoined that on ı the distress was taken, the cattle might have been ɑ thither, and there can be no doubt that the distress l have been well impounded there, though not a d might have intervened between the distraining and ıpounding. [*Maule* J. By your notice, the pound whole of the premises. That is the only place oned. *Tindal* C. J. Your notice says "the place :-mentioned," and no place is under-mentioned. not that shew that you intended to do something , and that the intention was not pursued? *Maule* J. gave notice of an impounding, but what you want ew is, that the notice was itself an impounding.] notice was evidence to shew that the bailiff had d to impound the cattle which he had distrained ıe demised premises. [*Maule* J. When did the ınding take place?] When the bailiff had put ıand upon the bullock, had made out the list delivered it, and had left a man in possession. & 2 *P. & M. c.* 12., a distress is not to be im- ded at several places, so as to make several re-

ı Referring to *Co. Litt.* where it is said, that a is guilty of a pound- ı, who takes his cattle out common pound, the door ıich he finds unlocked. *M.* 30 *E.* 3, fo. 26, pl. :o an action for pound- ı and driving away cattle ınded for [damage-fea- the defendant pleads that the cattle were taken in a place in which he had common appendant; that he pursued them freshly; and that, before he could reach them, the plaintiff had put them into a fold, and that he found them without any kind of enclosure by locking or other contrivance (*sans nul maner fermure deserrure, ou auter engine.*")

impounding was complete before the tender was made. By the 11 *G.* 2. *c.* 19. *s.* 10., persons making distresses for rent "may impound or otherwise secure the distress, of whatever nature it may be, *on such place, or on such part of the premises* chargeable with the rent, as shall be most fit and convenient, and may appraise, sell, and dispose of the same *upon the premises.*" The words "or otherwise secure" appear to me to enlarge "impound," and to give a wider meaning to it than if the latter well known term, implying an *inclosed* place, had alone been used. I think that when the notice of distress, in which it is stated that the distress had been *impounded,* was delivered, the acts of the parties distraining, which were at first equivocal, coupled with the notice, constituted a complete impounding; or, at least, that from the time at which the notice was given, the cattle were sufficiently *secured* to satisfy the statute. The case of *Firth* v. *Purvis,* which has been cited, appears to me to go the whole length of this. There, nothing was done to the door of the cellar in which the casks were; the party simply gave notice, and the giving of that notice was treated as amounting to an actual impounding. I cannot distinguish that case from the present.

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BOSANQUET J. During the progress of the argument I have entertained some doubt; but, upon the whole, I think that the tender came too late. The question is, whether that which was done before the tender amounted to an impounding within the statute of the 11 *G.* 2. *c.* 19. The difficulty which struck my mind was, that the cattle were suffered to remain precisely as they had been found. The bailiff put his hand upon one of them; he then left a person in charge, went away and returned. No act was done to change the position of the cattle; no padlock was placed on any gate. I had at first a doubt whether some distinct act was not necessary; but

r words, "in the custody of the law," the learned e must be understood to mean an impounding.

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AULE J. I should be very glad to come to the e conclusion with my Lord Chief Justice and my ther *Bosanquet*. Differing from them, I have little bt that I am mistaken. But the opinion which I rtained at the trial, I am bound to say, remains unnged.

wo questions arise in this case, first, whether there any evidence of an impounding within the 11 *G.* 2. .; and, if so, whether such impounding is within the e raised in this case, so as to deprive the tenant of right to tender the rent and costs of the distress.

he facts of the case were these: a person sent by the dlord to distrain, went into a field where the cattle e, and laid his hand upon one of them, saying that distrained the whole. He then counted them, put n the number in writing, and left the paper at the ant's house. On the following morning he delivered the tenant the notice which has been read. My ther *Bompas* was called upon to state at what time impounding took place. This he evidently felt siderable difficulty in doing. Ultimately he seems ave considered the impounding to have been come on the first day. My Lord and my Brother *Boquet*, however, hold that the impounding took place n the delivery of the notice. It appears to me that notice amounted to nothing more than an intimation the cattle had been *already* distrained and imnded; and I think that unless there had been a pres impounding in fact, the notice did not make one. notice stated, generally, that the cattle were imnded on the premises; yet there is no doubt that the ticular close called *Caecarreg*, in which the cattle were en (*a*), was meant to be the pound. Under this notice

(*a*) *Suprà*, 695.

goods distrained off the premises. If, at that time, the court had laid down the law of tender in cases of distresses, they might have said, using proper legal terms, if the landlord drives the cattle, &c. off the premises to the pound, the tender is too late. If that be so, the statute of the 11 G. 2. would clearly not have the effect contended for; and I think that by the words "impound or otherwise secure upon the premises," it was intended that impounding should be placed on the same footing as otherwise securing. It may be said that *Firth* v. *Purvis* is not consistent with this view of the question; but this point, as already observed, appears neither to have been discussed nor thought of in that case. It appears to me, that if the cattle had been secured upon the premises otherwise than by impounding, there is no authority for saying that the tenant's right of tender would have been taken away. I see no ground for giving a different effect to the word "impound" from "otherwise secure" with reference to this point; and I am of opinion that there is nothing in the statute to deprive the tenant of his right of tender so long as the distress remains upon the premises. This construction appears to me to be that which is most beneficial, both to the landlord and the tenant. By a contrary construction the former gains nothing but the power of vexatiously fixing the tenant with the costs of an action (*a*), after judgment in which

(*a*) Before the statute 11 *G.* 2. c. 19., a distress could be impounded only by removing it from the place at which it was taken, and placing it in a common pound, under the custody of the pound-keeper. A pound (*parcus*) imports a place sufficiently shut and inclosed to prevent cattle from escaping. But whether a pound should be locked or not, depended upon the discretion of the pound-keeper, exercised with reference, not to the completion of the impounding, but to the necessity of preventing a pound-breach. Thus, in the case referred to, from the *Year-book* of *Edward* 3. (*suprà*, 701. (a)), the plea justifying the alleged rescue, stated, that the defendant found the cattle in a place which was neither locked, shut, nor otherwise secured.

If, in the case of living cattle, a pound was constituted by such

sion; and the only question was, whether the distress, if made, had been abandoned. Upon both of the grounds which I have stated I feel myself unable to concur in the judgment pronounced by my Lord Chief Justice and my Brother *Bosanquet*.

TINDAL C. J. My Brother *Erskine*, who is gone to chambers, intimated to us before he went that he inclined to think that the impounding was complete previous to the tender.

Rule absolute.

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mand. If that demand had been submitted to and the 4*l.* 10*s.* had been paid, it seems at least questionable whether the excess could have been recovered back. See *Lindon* v. *Hooper*, *Cowp.* 414.; *Snowdon* v. *Davis*, 1 *Taunt.* 359.; *Hamlet* v. *Richardson*, 9 *Bingh.* 644., 2 *M.* & *Scott*, 811. The stat. 11 *G.* 2. *c.* 19. *s.* 10., however remote such a consequence may be presumed to have been from the contemplation of its framers, seems now to enable a bailiff, in every case, to hold out to the tenant this threat,—that if the latter dare to object to the payment of thrice the amount of what the former is entitled to demand, he shall be fixed with fifty times as much in the shape of costs in the action of replevin, in which he must necessarily fail, but which he cannot avoid bringing, unless he is prepared to see his goods sacrificed at the expiration of five days, without any remedy, except by the doubtful proceeding by indictment, or by the still more costly and hazardous experiment of an action on the case for extortion. Without any default in the *distrainee*, he finds himself deprived, by a few words which occur in a statute passed diversissimo intuitu, of the only protection which the law has provided against unnecessary and vexatious distresses for rent which he may have been willing and ready to pay from the moment it became due. *Vide Smith* v. *Goodwin*, 4 *B.* & *Ad.* 413., 1 *N.* & *M.* 371.; and see *Shipwick* v. *Blanchard*, 6 *T. R.* 298.; *Anscomb* v. *Shore*, 1 *Campb.* 285., 1 *Taunt.* 261.; *Sheriff* v. *James*, 1 *Bingh.* 341., 8 *Moore*, 334.

Possibly, if the result of the motion had been foreseen, an application would have been made to the learned judge to rule the point formally *against* the plaintiff, in order to give him an opportunity of tendering a bill of exceptions at the trial, it not being usual to except to the decision of the court in granting rules, though such a course seems to be not less within the words than the spirit of the statute of *Westm.* 2. *c.* 31., 2 Rot. Parl. 101 *a*, No. 12.

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disposing, as in the declaration mentioned,
es of cotton, parcel of the cotton in the
mentioned, *actio. non*, because long after the
r the bankrupts or either of them, had or
y interest, property, right, or title in or to
4 bales of cotton, or any part thereof, and
supposed converting and disposing thereof
ration, and in the introductory part of this
ned, and before the bankruptcy of *Hum-*
Frodsham, or either of them in the de-
ntioned, to wit, on the 10th of *April* 1837,
and *Frodsham* carried on business under
irm, and description of *C. Humberston* and
rpool, in the county of *Lancaster*, and one
ydes Molyneux, then residing and being in
id the seas, to wit, at *Charlestown* in the
tes of *America*, was then employed by the
berston and Co., for commission and reward
T. B. Molyneux, in that behalf, to purchase,
wn aforesaid, on his the said *T. B. Molyneux*'s
to be paid for by him to the original vendors,
sell the same to him, and to ship and con-
Charlestown aforesaid to *Liverpool* aforesaid,
and on account of the said *C. Humberston*
arge quantity of cotton, to wit, the cotton in
er mentioned, which was to be paid for by the
berston and Co. to the said *T. B. Molyneux*,
C. Humberston and Co. accepting and paying
f the said *T. B. Molyneux*, to be drawn upon
said *C. Humberston* and Co. in the usual
that behalf, for the amount of the price
tton as the said *T. B. Molyneux* should so
gether with such commission and the usual
that behalf. That the said *T. B. Molyneux*
to wit, on &c., in pursuance of the said em-
urchased the cotton in the introductory part

aforesaid, and before the same or any part thereof had been delivered to the said *C. Humberston* and Co. or to the plaintiffs, or to any person whatsoever, and before the said drafts so drawn by the said *T. B. Molyneux* upon the said *C. Humberston* and Co. had been paid by this *C. Humberston* and Co. and whilst the said drafts remained and were unpaid and outstanding, and whilst the said *T. B. Molyneux* remained and was wholly unpaid for the price of the said cottons or any part thereof to wit on &c., the said *C. Humberston* and Co. became and thenceforth always hitherto have been and still are wholly insolvent and unable to pay for the said cotton or to pay the said drafts or any of them or any other of their debts, though they were then indebted in large sums of money to divers and very many other persons; and neither the said *C. Humberston* and Co. nor the plaintiffs or any of them have at any time hitherto paid the said price or any part thereof, or the said drafts or any of them or any part thereof, and the said price is still wholly due and unpaid, and the said drafts are and each of them is outstanding and wholly unpaid and dishonoured by the plaintiffs; and thereupon and whilst the said cotton was and remained in and on board the said ship, and in the possession of the said *John Toole* for the purpose aforesaid, and after the said *C. Humberston* and Co. had become, and whilst they were, so insolvent and unable to pay as aforesaid, and before any delivery of the said cotton or any part thereof to the said *C. Humberston* and Co., or to the plaintiff or any other person, and whilst the said cotton was so wholly unpaid for, and whilst the said drafts were so unpaid and outstanding as aforesaid, to wit on &c., the said cotton came into the hands of the defendant, as in the declaration mentioned, to wit, as owner of the said ship, he then being the owner thereof (*a*), and the said *T. B.*

(*a*) Vide *infrà*, 718. 725.

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ing, that they had issued their writ and declared
ipon, not for the supposed conversion in that plea
oned, but for that the defendant, before the com-
ement of the suit, to wit, on &c., had converted
lisposed to his own use divers bales of cotton, of
the plaintiffs as such assignees as aforesaid were
lly possessed, as of their own proper goods and
ls, as such assignees, *different to and other than*
id bales of cotton in the introductory part of that
mentioned, to wit, 304 bales of cotton of great
, &c., and also for that the defendant had converted
lisposed of the *last-mentioned* bales of cotton on
and different occasions and times, and for other
lifferent purposes, and in another and different
er, than in the said plea mentioned, *modo et formâ*,
hich grievances, above newly assigned, were other
lifferent grievances from and than the supposed
nces in the said last plea mentioned and therein
pted to be justified; wherefore, inasmuch as the
dant has not answered the grievances above newly
ied, the plaintiffs pray judgment and their dam-
&c.

ea to the new assignment: not guilty.

the trial before *Erskine* J., at the Spring assizes
he southern division of *Lancashire*, the following
were opened by *Alexander* for the plaintiffs.

mberston and *Frodsham*, before their bankruptcy,
owners of the *Diamond*, which, it was suggested,
had mortgaged for 5000*l.* to the defendant. In
H. and *F.* sent the *Diamond*, to which they had
inted *John Toole* as master, to *Charlestown* in *South*
lina, with goods on freight, directing *Toole* to ad-
himself at *Charlestown* to *Thomas Blaydes Moly-*
the brother of the mortgagor, the now defendant,
hom they had sent orders to purchase cotton on
account, and to ship it by the *Diamond*, and to

cause it was contended on the part of the defendant, that the plaintiffs, in support of their new assignment, were bound to shew a conversion of bales of cotton beyond the 304 bales, or of bales which had not been shipped on board the *Diamond*. This, they were, of course, unable to do, and the learned judge being of opinion that the objection was well founded, directed a verdict for the defendant on the fourth issue.

Wilde, Solicitor-General, now moved for a new trial on the ground of misdirection. It is submitted that an effect was given to the new assignment, which does not properly belong to it. A good deal of embarrassment and difficulty arises in dealing with the cases in which the effect of a new assignment has been considered. It would certainly appear from many books, and particularly from 1 *Wms. Saund.* (*a*), as if, of necessity, under a new assignment, the plaintiff is bound to prove a different subject-matter, though of the same nature, from that stated in the plea, in respect of which it is supposed that a good justification has been pleaded. It is submitted that the whole effect of a new assignment is, to admit that the defendant in his plea has given a good answer to a supposed cause of action set forth in the plea. The defendant says, "the grievance complained of in the declaration is of such a description, to which I give such an answer." The new assignment neither admits nor denies the truth of that answer, but gives the go-by to it. The plaintiff says, "I do not call you to account for any such grievance as that set forth in your plea, nor shall I investigate the truth of the facts which you set up by way of answer. You may have converted, and converted for the cause alleged, the cotton mentioned in your plea. The grievance which you have

(*a*) 1 *Wms. Saund.* 299. n. (6).

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rted. Thus the plaintiffs allow full effect to the plea; ey leave the defendant perfectly unaffected by any arge of conversion accruing out of an alleged stoppage . *transitu*, and only seek to charge him in respect of is conduct in relation to a transaction totally distinct om that stated in the plea. [*Tindal* C. J. The lan-uage of the new assignment is, that the defendant con-erted "other and different bales of cotton" to his own se.] The word "other" does not there mean, in point of law, "other bales of cotton," but "bales of cotton under circumstances totally different from those referred to in the plea:" *Darby* v. *Smith*. (*a*) In the present case, the delivery of the cotton on board of the *Diamond* was not a delivery to *Toole* with a view to a subsequent delivery to *H.* and *F.* after the vessel should have reached *Liverpool*, but an immediate delivery to *H.* and *F.* in *Charlestown* by placing it on board of a vessel sent by them to receive it; *Ogle* v. *Atkinson*. (*b*) The plea alleges that the cotton was delivered to *Toole* as a third person, and states a stoppage *in transitu* before any delivery to *H.* and *F.* had taken place. The cotton referred to in the plea, therefore, is cotton delivered to *Toole* on board a general ship, and before delivery to *H.* and *F.* getting into the possession of the defendant; whereas the cotton in respect of which the action is brought, is cotton delivered, not to *Toole*, but to *H.* and *F.* through the hands of *Toole*, the master of the *Diamond* appointed by them, into their floating warehouse, and not into a general ship; which allegation is introduced into the plea for the purpose of disconnecting *H.* and *F.* with the delivery, the distinction being, between a delivery on board of the purchaser's own ship, which puts an end to the right of stopping *in transitu*, and shipping on board a general ship, which does not.

(*a*) 2 *Mood. & R.* 184. (*b*) 5 *Taunt.* 759.; 1 *Marsh.* 328.

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v. *Sherman* and *Norman* v. *Wescombe*. (*a*) is given to the plea, to which the plaintiffs l by a new assignment, when it is held that s are bound to prove a cause of action per- ct from that which is attempted to be jus- ie plea. Whether the cause of action is ith the same subject-matter or not, is quite

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d it necessary to provisions of the

ion to reply *de in-* ion *ex contractu*, e been first grant- rt of Exchequer. *Rich*, 2 *C. R.* & *saac* v. *Farrar*, 281., 1 *Mees.* & *Elwell* v. *Grand npany*, 5 *Mees.* The practice has ognized in *Grif- New Cases*, 579., in this court; *Watson* v. *Wilks*, 237.; *Reynolds* 7 *Adol.* & *Ell.* this course of to be disturbed. le of taking the higher tribunal tion, whether the r have not ex- authority, and ought not to to the powers 4 *W.* 4. *c.* 42., e by a special duplicity; but rules of pleading, hich have a clear tion, the judges mited power of any demurrer, cial, as frivolous, category would included a de- murrer, which should have for its object to call in question a course of pleading which has now for some years been established in practice. It seems, indeed, to be more probable that the rule will be extended to other actions *ex contractu*, as to covenant and debt, which stand *in pari ratione*. It is true that in covenant, and in debt on specialty, in which actions there is no general issue, the same difficulty was imposed upon plaintiffs before the new rules, as in assumpsit under those rules, but the inconvenience being of less frequent occurrence, was not equally felt. Perhaps a replication of *infregit conventionem, de injuriâ suâ propriâ absque tali causâ* would, but for the practice of replying that the defendant *broke his promise, de injuriâ*, &c., have been considered as equally objectionable with a plea of *non infregit conventionem*. It may however be observed, that in the plea of *non infregit conventionem* the two negatives form part of the issue, whereas upon a replication of *infregit conventionem, de injuriâ* &c. the breach of covenant having been admitted by the plea, the *talis causa* only is in issue.

(*a*) 2 *M.* & *W.* 349.

to amend. The rule was, however, drawn up, and served merely for a new trial, leaving it to the court to grant a rule absolute in this general form, or with the conditions above mentioned. (*a*) Against this rule,

Channell Serjt. now shewed cause. The bankrupts had not paid for the cotton: their agent, who bought the cotton for them, had. There was, therefore, a clear right to stop *in transitu*. The plea accordingly confesses a conversion, and avoids it by a statement of the circumstances which gave the right to stop *in transitu*, and of the fact of a stoppage *in transitu* having taken place. It should be borne in mind that the question in this case arises, not upon a replication traversing the plea, but upon a replication by way of new assignment. It was admitted at the trial that there was no transaction between these parties coming within the declaration, except one transaction relating to 304 bales of cotton shipped on board of the *Diamond*. The cotton, therefore, in the plea and in the replication is the same; the statement as to the circumstances under which that cotton is supposed to have been detained, is different. It has been contended for the plaintiff, that there may be two conversions of the same cotton. This is not disputed; but the question is, whether this replication does set out a different conversion of the same cotton. The object of a new assignment is, to make that clear which was left in doubt by the declaration, or which was made doubtful by the plea, and therefore the statement which it contains should be precise and accurate. The authorities upon this subject, up to a certain time, are collected in the notes to 1 *Wms. Saund.* 299. *b.* The principle of new assignments is to be deduced from the

(*a*) The argument in support of the application for a rule *nisi* is given thus fully because the Solicitor-General was not heard upon the motion to make the rule absolute.

trespass which was not committed in the close mentioned in the plea. A new assignment has been said to be exactly like a new count in a declaration. If, in an action for trespass to goods, there had been two counts, the plaintiff might have proved a second trespass to the same goods in support of the second count. So here, it is no answer to say that the bales of cotton mentioned in the plea and in the new assignment, are in fact the same bales. Suppose the defendant had pleaded to the new assignment that there were no other goods than those mentioned in the plea, it would have been sufficient for the plaintiff to prove the existence of a different ground of action from that mentioned in the plea. For this purpose *Bolton* v. *Sherman* is directly in point.

It would have been no answer to a new assignment of another conversion of bales of cotton, to plead that the bales which formed the subject of the conversion were the same. The words "other and different" merely denote that the bales are different in the circumstances attending them, which is the material question between the parties, and not the identity or non-identity of the cotton seized by the defendant under a claim of title as mortgagee of the ship, with cotton supposed to have been seized under a right to stop *in transitu* by an unpaid vendor. The plaintiff may never have heard of the transaction detailed in the plea; all that he knows is, that he is seeking to recover the value of certain property which the defendant claimed and seized as the mortgagee of the ship. [*Erskine* J. My brother *Parke* made an observation which justifies your view of *Bolton* v. *Sherman*. *Tindal* C. J. In that case there were three newly acquired horses, to which the title set up by the defendant did not apply.] The principle, it is submitted, is the same. If the plaintiff was not bound to assert that there is a second conversion, so he was not bound to shew that the bales were different. [*Bosan-*

fore, &c." I cannot but understand these words erring to the bales mentioned in the plea, and as ting, that the plaintiffs are suing for a different rsion of the same cotton as that spoken of in the

What the plaintiffs mean by the new assignment rs to be this, "We go, not for the conversion ned in the fourth plea, but for a conversion of and different bales of cotton, and also for a con- n of bales of cotton upon another and a different on." What can that mean but that the plaintiffs ing for a different conversion of the same goods? nly difficulty attending this construction is caused e words "the last-mentioned." But though in grammatical construction these words would refer 304 bales to which the first branch of the new ment applies, I think that they may fairly be re- to the 304 bales mentioned in the introductory f the plea.

e cause must go down to a new trial. Perhaps the ssignment might be open to a special demurrer, herefore the plaintiffs, if they think proper, may l it on payment of costs; but if they choose to ed to a new trial upon the present record, they l be allowed to do so. It is probable, if the case d again, that the defendant may take such pro- gs as will bring it before a court of error; for is certainly great difficulty in coming to a decision it.

BANQUET J. (after stating the new assignment.) the fourth issue a verdict was directed for the lant, upon the ground that the bales of cotton, formed the subject of the new assignment, were s in that new assignment is alleged, different from ther than the bales of cotton to which the justi- n is pleaded. What, then, is the true construction

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in the second branch of the new assignment the are stated to have been disposed of on other and ent occasions and times than, and in a different ıer from, those in the plea mentioned; which rts that the bales thus subjected to *another* and *ent* conversion, were the same bales as those men- d in the plea. (*a*) The last allegation in the assignment can therefore refer only to the bales hich the justification is pleaded. This inconsis- would have been a good ground of special de- er (*b*); but the defendant has pleaded over, and we ıt liberty to look at what the parties substantially ıt, as to which I agree with my lord and brother ıinking the new assignment is divisible in the

) Thus, if in trover for a , the defendant pleads that conversion consisted in g a black horse hired by from the plaintiff, and the tiff new-assigns the con- on of a grey horse, and the conversion of the grey on other occasions, and different manner than and those mentioned in the it might not unreasonably ferred that the black horse, not the grey horse, was meant, inasmuch as the had not alleged a conver- of the grey horse on *any* ion, or in *any* manner.

) The ground of special ırrer would have been, the guity introduced into the assignment by the words last-mentioned." In the presented to the court by Solicitor-General, in his nent on moving for the (*suprà*, 718.), this ambi- would appear to be imma- l; and although no judg- was pronounced by the upon that argument, yet the statement that the new assignment would have been bad upon special demurrer, seems to imply that the court did not adopt the view taken by the Solicitor-General.

It was not suggested in the course of the argument, that the new assignment was open to any objection on the ground of *departure*. The declaration speaks of divers, to wit, 400 bales and 400 bags of cotton,— in other words, of a quantity of cotton not exceeding 400 bales and 400 bags. The new assignment, according to the construction put upon it by the majority of the court, speaks of a conversion of two parcels, one, consisting of 304 bales not mentioned in the plea, the other, consisting of the 304 bales in the plea; but the conversion of both parcels may have taken place at the same time, so as to constitute the *one* conversion of the declaration, and the quantity of cotton in the declaration seems to be sufficiently large to cover both parcels.

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NCE and HILL *v.* JOSEPH WHITE, WILLIAM OBINSON, and HANNAH, his Wife, and Five thers. *June* 27.

SUMPSIT. The declaration stated that *the defendants* on &c. were indebted to the plaintiffs in ., for the work and labour, care, diligence, journeys, attendances of the plaintiffs by them before that done, performed, and bestowed as the attorneys of solicitors for the defendants, and upon their retainer ıd about certain businesses of *the defendants* and for *efendants* and at their request, and for fees due, and ight payable from and by the defendants to the ıtiffs in respect thereof, with counts in a similar form money paid, and on an account stated, and laying promises of payment as made by *the defendants.* lea: that the several alleged promises in the deition mentioned were made by *the defendants* jointly one *J. G.* and one *J. B.* who are still living, and , at the time of the commencement of this suit, were still are, resident within the jurisdiction of this court,

If in *assumpsit* against *A.*, and *B.*, his wife, the declaration allege that the defendants promised, without stating whether the promises were made before or during the marriage, it is bad on special demurrer, *per Maule J.*

But where, to such a declaration, the defendants merely plead (in abatement) that

romises were made by the defendants and *C.* jointly, and not by the deants alone, and a verdict is found for the plaintiff on an issue taken upon lication stating that the promises were not made to the defendants and *C.* y, the court will presume, for the purpose of supporting the declaration, the promises were made before the marriage, when a joint liability might eated. (*a*)

mble, that a plea in abatement in *assumpsit*, that the alleged promises were by the defendants and one *C.*, and not by the defendants only, contains a ient confession of the promises in the declaration to entitle the plaintiff to nent after a verdict negativing the plea.

(*a*) The same rule would ır to apply to a special in bar in confession and lance, where the matter ed in avoidance is negatived or confessed and avoided by the replication, and the matter in avoidance in the plea is negatived, or that in the replication is affirmed, by verdict.

ial fact which the declaration has omitted to state. *orris and Wife* v. *Norfolk* in error (*a*), the declar- against the defendants below (the plaintiffs in error), a debt due from the wife before marriage, and a se by husband and wife after the marriage, and dgment was reversed. Here, the declaration is bad, er the promises are supposed to have been made e or after the marriage. If made *before*, it should been so stated, and then, if the wife had died pend- e action, no judgment could have been entered up t the husband. If, on the other hand, the promises be taken as having been made *after* the marriage, omises of the wife would be void, and she ought have been included in the action. A rule *nisi* g been granted,

annell Serjt. (with whom was *Talfourd* Serjt.) now ed cause. If the declaration be capable of receiv- ny construction which will support the action, the will so construe it. (*b*) It is not alleged in the ration that the promises were made *during* the co- re. The statement amounts to no more than this, the cause of action accrued before the commence- of the action. The declaration may be supported pposing that *Hannah Williams*, during her widow- took *William Robinson* into partnership (*c*), and vards married him. In *Morris and Wife* v. *Nor-* such a supposition was excluded, because there it expressly stated that the promise was made after marriage. In that case *Mansfield* C. J. inquired her any cases were to be found in which the decla-

1 *Taunt.* 212.

See the cases as to de- cured by verdict, collected ote to *Clement* v. *Fisher*, & *R.* 285.; see also *Doe gers* v. *Bath*, 2 *N.* & *M.* 442.; *Tibbits* v. *Yorke*, 5 *N.* & *M.* 612.

(*c*) There might be a joint *promise* without any partnership existing between the co-promisors.

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:r verdict, in that sense which will support the action, t be capable of such a construction. [*Tindal* C. J. the promises are made before marriage, the husband l wife must join; it may be said on the other side, t if issue had been taken upon the joint promises, the ge would have told the jury that unless the promises e made before the marriage, their verdict ought to be the defendants.]

Gray, in support of the rule. The plaintiffs do not y on *Morris and Wife* v. *Norfolk* as a case similar to present; that case was merely cited for the pur- e of shewing what was required in a declaration inst husband and wife. But in *Bidgood* v. *Way* (*a*), was held that husband and wife cannot join in *as- psit* without stating the interest of the wife. [*Maule* J. that case there was no pleading over. *Tindal* C. J. ere, it would have been contrary to the declaration say that the promise was made before the marriage; e, it is left in doubt.] In *Keyworth* v. *Hill* (*b*) the laration stated a joint conversion by husband and e; but it was not attempted to be there argued that conversion might have been before the marriage. *ndal* C. J. Do you not by pleading over, admit that y were good promises by husband and wife, which ld only be if the promises were made before the riage?] The plea admits that which is *alleged* in declaration, but the declaration does not contain any ement of promises before the marriage.

TINDAL C. J. Judgment is not to be arrested unless learly appear that there is error on the face of the

(a) 2 *W. Bla.* 1236.
(b) 3 *B. & Ald.* 685. And see *ry* v. *Hoole, Cowp.* 825.; *ougl.* 683. *n. Wright, qui* v. *Horton*, 1 *Stark. N. P.* *C.* 400.; *Holt, N. P.* 458.; 6 *M. & S.* 50.; 2 *Chitt. Rep.* 25.; *Bradley* v. *Milnes*, 1 *New Cases*, 644.; 1 *Scott*, 626.; 1 *Hodges*, 158.

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: but they say, that such promises were made by fendants jointly with other persons. The issue the defendants raise is, whether promises, which reed on both sides to have been made by the ants, were made by them alone, or by them with *J. G.* and *J. B.* If, in any view which can en of this declaration, the promises might be s would create a legal liability in all the defend- hat view ought to be adopted by the court. I therefore, the judgment in this case ought not rrested, but that the defendants should be left to rit of error.

Rule discharged.

OF SITTINGS IN BANC IN TRINITY VACATION.

MEMORANDUM.

n *Glover*, of the *Middle Temple*, Esquire, and *Gaselee*, of the *Inner Temple*, Esquire, Barristers , having received writs, issued in this vacation, nt to 6 *G.* 4. *c.* 95., commanding them to appear Court of Chancery, and to take upon themselves te and dignity of a Serjeant at Law, appeared the Lord Chancellor at *Lincoln's Inn*, on the *June*, and, taking the oaths usually administered ons called to that degree and office, became ts at Law sworn, agreeably to the provisions of

former gave rings with the motto *Reginâ et lege serviens*, the latter, with the motto *Nec temerè dè*. On the ring presented to the Queen, both were inscribed.

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ers, stereotype-founders, and letter-press
hich they the defendants then used, exer-
carried on, and should and would to the best
ver promote and advance the success and
of the defendants in their said trades; and
ıe plaintiff should not nor would, during the
›f seven years, be engaged or concerned in
r any other trade or business either on his
nt or on account or for the benefit of any
›n whatsoever, other than the defendants and
›r of them, without the consent of the said
or one of them in writing first had and ob-
:hat purpose; and the defendants thereby, for
:rations aforesaid by the said memorandum of
for themselves and the survivor of them,
nd with the plaintiff, that they the defendants,
ivor of them, should and would employ him
f as their foreman in the carrying on, ma-
l conducting the said trades as type-founders,
founders, and letter-press printers during the
›f seven years, if the defendants should so long
he plaintiff should well and faithfully observe
he covenants or agreements thereinbefore on
ntained; and that they the defendants, or the
them, should and would pay to the plaintiff
the rate of 3*l.* 3*s.* weekly; and it was by the
:andum of agreement further mutually agreed
:d by and between the said parties thereto, to
intiff and the defendants, that in case either of
should not well and truly observe, perform,
the agreements therein on their respective
ıined, then and in such case the party so
ıaking default should and would pay to the
em the sum of 500*l.* by way or in the nature
damages. [Mutual promises.]
ıt: that the plaintiff, confiding in the said

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him to remain and continue in their service as their foreman in carrying on and managing and conducting their said trades of letter-type founders, &c. during the residue of the said term of seven years, or any part of such residue; but wholly refused so to do, and, on the contrary thereof, after the making of the said memorandum of agreement, and of their said promise, and after the plaintiff had so been and remained in their service as foreman as aforesaid for the said part of the said term of seven years, to wit, on the 31st of *July* 1836, wrongfully and unjustly, without any reasonable or sufficient cause, and without the licence or consent, and against the will of the plaintiff, dismissed and discharged him from their service as their foreman as aforesaid, and refused to suffer or permit him to remain or continue therein for the said residue of the said term, or any part thereof, and have from thence hitherto refused to employ him or suffer or permit him to be, or remain and continue in their service as such foreman as aforesaid, contrary to the form and effect of the said memorandum of agreement, and the promise and undertaking of the defendants so made as aforesaid; and so the plaintiff, in fact, said that the defendants did not well and truly observe, perform, and keep the agreements in the said memorandum of agreement on their parts contained, but wholly neglected, omitted, and refused so to do, and therein failed and default; and thereby and according to the form, force, and effect of the said memorandum of agreement, and their said promise they became liable to pay, and ought to have paid, to the plaintiff the said sum of 500*l.* in the said memorandum of agreement mentioned, and thereby fixed and agreed on as specific damages on such breach and default as aforesaid.

The declaration also contained counts for money paid and upon an account stated.

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a to remain and continue in their service as their eman in carrying on and managing and conducting eir said trades of letter-type founders, &c. during the sidue of the said term of seven years, or any part of ich residue; but wholly refused so to do, and, on ie contrary thereof, after the making of the said memorandum of agreement, and of their said promise, and ter the plaintiff had so been and remained in their rvice as foreman as aforesaid for the said part of the id term of seven years, to wit, on the 31st of *July* 36, wrongfully and unjustly, without any reasonable sufficient cause, and without the licence or consent, and against the will of the plaintiff, dismissed d discharged him from their service as their foreman aforesaid, and refused to suffer or permit him to remain or continue therein for the said residue of the said rm, or any part thereof, and have from thence hitherto fused to employ him or suffer or permit him to be, remain and continue in their service as such foreman as aforesaid, contrary to the form and effect of e said memorandum of agreement, and the promise d undertaking of the defendants so made as aforesaid; d so the plaintiff, in fact, said that the defendants did t well and truly observe, perform, and keep the agreements in the said memorandum of agreement on their rts contained, but wholly neglected, omitted, and fused so to do, and therein failed and default; and ereby and according to the form, force, and effect of e said memorandum of agreement, and their said promise they became liable to pay, and ought to have paid, the plaintiff the said sum of 500*l.* in the said memorandum of agreement mentioned, and thereby fixed and greed on as specific damages on such breach and default as aforesaid.

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ment of the said *W. M. Knight* and *J. Surgey* as their foreman, in the carrying on of their said trade of letter-type-founders, &c., and the said parties to these presents, are mutually desirous of continuing their connection together for the term of seven years from the date of these presents: Now, these presents witness that the said *D. Beckham*, for the considerations hereinafter mentioned, doth hereby covenant with the said *W. M. Knight* and *J. Surgey*, and the survivor of them, in manner following; that is to say, that he the said *D. Beckham* shall and will well and faithfully serve the said *W. M. Knight* and *J. Surgey*, and the survivor of them, for and during the term of seven years, to commence and be computed from the day of the date of these presents, as their foreman in the management and carrying on of their said trades of letter-type-founders, &c., and shall and will, to the best of his power, promote and advance the success and prosperity of the said *W. M. Knight* and *J. Surgey* in the said trades; and also that he the said *D. Beckham* shall not, nor will, during the said term of seven years, be engaged or concerned in the same or any other trade or business, either on his own account or on account of or for the benefit of any other person whatsoever other than the said *W. M. Knight* and *J. Surgey*, and the survivor of them, without the consent of the said *W. M. Knight* and *J. Surgey*, or one of them, in writing, first had and obtained for that purpose, and the said *W. M. Knight* and *J. Surgey*, for the considerations aforesaid, do hereby, for themselves and the survivor of them, covenant with the said *D. Beckham* that they the said *W. M. Knight* and *J. Surgey*, or the survivor of them, shall and will employ the said *D. Beckham* as their foreman, in the carrying on, managing, and conducting of the said trades of letter-type-founders, &c., during the said term of seven years of the said *W. M. Knight* and *J. Surgey*, or either of them, shall so long live, and the said *D. Beckham*

CASES

ARGUED AND DETERMINED 1840.

IN THE

URT OF COMMON PLEAS,

IN

Michaelmas Term,

IN THE

IRTH YEAR OF THE REIGN OF VICTORIA.

: Judges who usually sat in Banc during this were,

TINDAL C. J. COLTMAN J.
BOSANQUET J. MAULE J.

UNWIN *v.* LEAPER. *Nov. 5.*

BT for money had and received, and upon an ccount stated. Plea: *nunquam indebitatus.* he trial before *Tindal* C. J. at the sittings at Guild- ter last term, the following facts appeared: —

Pending an action of ejectment on the demise of *A.* against *B.*, *A.* is served with

of *B.*'s intention to sue for certain statutable penalties incurred by *A.* ngement is made, under which the action of ejectment is discontinued, receives from *A.* 50*l.* towards the costs of *B.*'s defence in that action. recover back the 50*l.* as money received by *B.* to *A.*'s use, if the 50*l.* is o have been paid with reference to, and by the coercion of, the threatened ction, and not to have been paid voluntarily, and with reference to the f ejectment only.

lthough the arrangement contain terms to be performed, and which are ed, by *B.*, the performance of which prevents *B.* from being restored to nal position, otherwise than by the intervention of a court of equity.

e Queen's Bench. 1840.

(*Doe dem.*) *Stephen Unwin*, plaintiff.
Daniel Leaper, defendant.

UNWIN v. LEAPER.

plaintiff to abandon this action, and within
days from the date hereof, to pay to the de-
or his attorney the sum of 50*l.*, being an agreed
be paid by the plaintiff and accepted by the
nt for his costs.

plaintiff to release to the defendant within the
ne, by a sufficient instrument in the law, all
the freehold of the *Chaseway*, the subject of
ion, reserving to the plaintiff, for himself, his
d assigns, at all times, and his and their work-
e right of passage over such part as is necessary
eadow with waggons, carts, and other carriages,
horses and other cattle.

above are the terms of settlement of the action
agreed upon, which, on the part of our re-
clients, we severally undertake to fulfil.

this 25th day of *February* 1839.

Samuel Wayler, attorney for plaintiff.
Thomas Sadler, attorney for defendant.

he 9th of *March* an indenture was executed
plaintiff and the defendant, whereby, after re-
at the plaintiff had lately commenced an action
the defendant touching the title to a certain
y or slip of land, leading &c., which had for
ears been claimed by both of the parties thereto,
t it had been agreed that the plaintiff should
to the defendant his claim to the freehold of
Chaseway or slip of land, and should have and
nly a right of way over the same, it was wit-
that in consideration of the premises, and of
c., to the defendant paid by the plaintiff, the
whereof, and that the same was in full dis-

proposed action; that the defendant was at liberty to abandon his action for the penalties; that though the proposed action for the penalties was in contemplation, the plaintiff had a right to give the 50*l.* if he pleased towards the costs of the defence of the action of ejectment; but that if the plaintiff did so, not of his own mind, but in consequence of the threat of the penalties being enforced against him, that was what the law would not allow, and in that case the plaintiff would be entitled to bring his action for the money so paid; and he requested the jury to say, whether it was a free, a voluntary payment, or a payment made by coercion; that in the latter case, the plaintiff would be entitled to recover back the 50*l.* which he had paid. The jury returned a verdict for the plaintiff, damages 50*l.* (*a*)

The learned judge then said to the defendant's counsel, "If I have laid down the law wrong, you are at liberty to move for leave to enter a nonsuit."

Thesiger now moved accordingly.

In *Williams* v. *Hedley*, which was cited at the trial, an action had been commenced, which circumstance brought the parties within the operation of 18 *Eliz. c.* 5. Here no action had been commenced; it was only threatened; and although the arrangement may have been illegal at common law, yet it must be remembered that at common law both the parties to an illegal agreement are culpable, and if *in pari delicto*, it is well known that *potior est conditio possidentis.* Another objection to the right to recover back the 50*l.* is, that the parties cannot

(*a*) The verdict would be entered, "that as to the sum of 50*l.*, parcel of the debt mentioned in the first count of the declaration, the defendant was indebted to the plaintiff, *modo et formâ*, and that the plaintiff had sustained damage on occasion of the detention of that debt to 1*s.*, costs 40*s.*, and that as to the residue of the debt in the declaration mentioned, the defendant was not indebted, *modo et formâ.*

paid with reference to the action brought to recover the possession of the *Chaseway* only, or whether it had reference also to the threatened penal proceedings. 1840. UNWIN v. LEAPER.

COLTMAN J. No jury could shut their eyes to the real nature of such a transaction.

MAULE J. It appears to me that the question, whether the payment had reference to the penal action or not, was a proper question for the jury; and I also think that the jury came to a right conclusion.

Rule refused. (*a*)

(*a*) And see *Collins* v. *Blantern*, 2 *Wils.* 341.; *Edgecombe* v. *Rodd*, 5 *East*, 294., 1 *J. Prince Smith*, 515.; 1 *J. W. Smith's Leading Cases*, 154.

REYNOLDS *v.* DOYLE. *Nov. 5.*

ASSUMPSIT. The declaration stated, that in consideration that the plaintiff would accept a bill of exchange bearing date 27th *September* 1832, drawn upon him by the defendant, for 60*l.*, payable forty days after date to the order of the defendant, as for value received, the defendant promised the plaintiff to indemnify the plaintiff and save him harmless from any loss or damage for or by reason of his acceptance of the said bill. Averment: that the plaintiff, confiding &c., accepted the said bill, and delivered it so accepted to the defendant for the purpose aforesaid; and although the said bill was afterwards, to wit &c., negotiated by the defendant for his own use and benefit, and has long since become due and payable; yet the defendant did

A party who requests another to "lend his acceptance," impliedly engages to take up the bill at maturity, and to indemnify the acceptor against the consequences of non-payment.

Upon a contract to indemnify an accommodation acceptor, the statute of limitations begins to run from the time at which the plaintiff is damnified by actual payment.

contract to indemnify *A.* against the costs of an action, *A.*'s cause of action against *B.* arises when *A.* pays the costs, and not when the costs are incurred, or when *A.*'s attorney delivers his bill of costs. The learned judge overruled the objection, but gave the defendant leave to move to enter a nonsuit.

A verdict having been found for the plaintiff, damages 46*l.*,

Bompas Serjt. now moved according to the leave reserved. The defendant is entitled to a nonsuit, inasmuch as the plaintiff did not establish the affirmation of either of the issues. The evidence did not make out the special promise, and the cause of action accrued more than six years before the commencement of the action. In *Battley* v. *Faulkner* (*a*), a plea of *actio non accrevit infra sex annos*, was held to be a sufficient answer to an action for not delivering wheat according to contract, where the period for delivery was more than six years before action brought, though the declaration

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ceptor, was liable to an action for those expenses without proof that he had paid them. And see *Nightingall* v. *Devisme*, 2 *W. Bla.* 684., 5 *Burr.* 2592.; *Jones* v. *Brinley*, 1 *East*, 1.; *Taylor* v. *Higgins*, 3 *East*, 169.; *antè*, 150.

In *Collins* v. *Rose*, 5 *M. & W.* 194., it was held that the three months after the fact committed,—within which an action for any thing done in pursuance of 53 *G.* 3. *c.* 127. is to be commenced,—extended to three months after the day of the sale of goods taken on a previous day as a distress for arrears of church-rates, and afterwards removed and sold. In delivering the judgment of the Court of Exchequer, *Parke* B. says, "If the words 'after the fact committed' are to be considered as equivalent to the words 'after the cause of action' in the statute of limitations, then the plaintiff has clearly a right to recover, for he may treat the removal into *Oxfordshire* itself as a trespass, and sue in respect of that cause of action, and the subsequent sale, both being within the limited time, as he would have recovered if the original seizure had been more than six years before, and the subsequent removal within six years of the commencement of the suit and the ordinary plea had been pleaded." *Ibid.* 201. *Vide antè*, 557 (*a*).

(*a*) 3 *B. & Ald.* 288.

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KEMBLE *v.* MILLS.

Nov. 12.

ASSUMPSIT upon articles of partnership between the plaintiff and the defendant, for carrying on the trade of refiners of sugar and molasses, by which it was agreed, *inter alia*, — that the profits of the trade should be divided into twelve shares, of which six were to belong to the defendant, and six to the plaintiff: that the defendant should place to the credit of the concern 5000*l.*: that the plaintiff should place to the credit of the concern 2000*l. or thereabouts:* that the plaintiff should procure the residue of a certain term in certain premises, at a certain yearly rent, terminable in the manner in the said articles mentioned: that provided the plaintiff brought in a less sum than 2000*l.*, the whole amount of his share of the profits should be kept in the concern until that sum should, together with such profits, amount to 2000*l.*: that after the said sum of 2000*l.* should have been so made up by the plaintiff's profits or otherwise, then one third of the plaintiff's profits should be retained until the further sum of his part, it is sufficient, if the defendant demur generally, or if he plead over.

Where, by an agreement, concurrent acts are to be done by the plaintiff and the defendant, a declaration against the defendant for not doing the act on his part, should allege that the plaintiff was ready and willing *to do the concurrent act* on his part. But if the plaintiff merely allege that he was ready and willing *to perform the agreement* on

Where a declaration in *assumpsit* describes the terms of the contract in language denoting that a particular act, which the plaintiff has engaged to do, is to be independent of, or concurrent with, an act or acts to be done on the part of the defendant, if, from the position of the parties, or from the nature of the agreement, such act is to be considered as intended to constitute a condition precedent, the proper course is, to plead *non assumpsit*, and give the special matter in evidence, *per Maule* J.

If the defence be specially pleaded, *semble*, that the plea will be bad on special demurrer, as amounting to the general issue, — *per eundem.*

Want of notice of the dishonour of a cheque on a banker is sufficiently excused, *primâ facie*, by alleging that the banker had no effects of the drawer, and had received no consideration for payment of the cheque, and that the defendant had sustained no damages by reason of his having no notice of dishonour, — at least upon general demurrer.

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the same to the plaintiff; and that the *London stminster* bank did not pay the said draft when e was presented; and that the said *London* and *ister* bank had not in their hands any effects of ndant, nor had they received any consideration ment by them of the said draft or order, nor defendant sustained any damage by reason of having had notice of the nonpayment by the *ndon* and *Westminster* bank of the said draft r.

ie first count of the declaration the defendant , thirdly, that the obtaining of the licence in that nentioned, was an essential preliminary to the of the trade; and that until the said licence was d, the said trade could not be safely engaged in rtaken by the defendant; of all which premises ntiff had notice; and that the plaintiff, in con- on that the defendant would enter into partner- th him for the purposes aforesaid, did then to procure at his own cost such licence from l Mr. *Derone;* yet that no such licence was, at e before the commencement of this suit, obtained e said Mr. *Derone.* Verification.

defendant pleaded, fourthly, to the said first f the declaration, that the plaintiff did not, at e before the commencement of this suit, place to dit of the said concern the said sum of 2000*l.*, sum or sums whatever, according to the said ent in that count mentioned. Verification. (*a*)

he second count of the declaration the defendant ed generally. The ground of demurrer stated in gin was, the insufficiency of the reasons alleged count to excuse the want of notice of dishonour. plaintiff demurred to the third and fourth pleas, ground that the matters therein respectively con-

(*a*) *Antè*, 288. *n.*, 754.

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, is tantamount to an allegation of readiness to g in the 2000*l.* [*Coltman* J. In *Varley* v. *Manton* declaration contained an averment of actual per- ance: here the averment is only that the plaintiff always been ready and willing to perform and keep agreement.] A readiness to do a concurrent act is valent to actual performance. (*a*) The bankers' unt was to be kept in the name of the defendant; it would be a great hardship if the plaintiff were nd to pay, although the defendant did not pay. third plea is also bad: the introductory averment mmaterial. [*Coltman* J. It does not appear what licence was about. *Maule* J. There is no aver- it that a reasonable time had elapsed.] Many things ld be to be done before the licence would be wanted. ore the licence could be available, it would be neces- to obtain the lease of the premises. The plea lers an issue upon that which can only be matter of ion. [*Bosanquet* J. It does not state that the ies agreed that the licence should be obtained be- the business should be entered upon. *Tindal* C. J. would be the cheaper course to negotiate for the nce first.]

Another mode of viewing this part of the case is, that matter alleged in the third plea could go no further n to establish a partial failure of consideration, ich would not prevent the plaintiff from recovering his action. *Pordage* v. *Cole* (*b*), in the notes to which important cases of *Boone* v. *Eyre* (*c*) and *Campbell* v. es (*d*) are referred to. *Carpenter* v. *Cresswell.* (*e*)

The demurrer to the second count raises the ques- , whether the want of notice of dishonour is suffi- ntly excused. [*Tindal* C. J. I suppose the objection

(*a*) *Vide Rawson* v. *Johnson*, *ast*, 203.; 2 *Wms. Saund.* . *n.*

(*b*) 1 *Wms. Saund.* 320.

(*c*) 1 *H. Bla.* 273. *n.*

(*d*) 6 *T. R.* 570.

(*e*) 4 *Bingh.* 409.; 1 *Moore & P.* 66.

the fact should be left to be stated in the plea than that it should be negatived by anticipation in the declaration. [*Tindal* C. J. The plaintiff has alleged that the defendant has not sustained damage by the want of

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sulting from the insolvency of the drawee, by depriving him of all right of resorting to the drawer for the value of the bill, without prejudice however to any power he may have of obtaining payment from the drawee, for which purpose he is allowed to exercise the rights of the drawer. In order to enforce this penalty, and in order that the drawer and indorsers may be entitled to insist upon the inadmissibility of the claim of the holder (*soient admis dans la fin de non-recevoir, contre la demande du propriétaire de la lettre*), founded upon the neglect of the holder to cause the bill to be protested (or to bring his action within the time fixed by the Ordonnance), they are bound to prove, within the time fixed by the court, that the drawee held funds to meet the bill at the time at which it ought to have been protested; in default of which proof they are bound to reimburse the holder the amount of the bill.

This is so decided by the Ordonnance de 1673, tit. 5, art. 16. which says, the drawers and indorsers of bills shall be bound to prove that the drawees were indebted to them, or had funds in their hands, at the time when the bill ought to have been protested, otherwise they shall be held liable to reimburse the holder. The reason is, that as the drawer, who has remitted no funds, and is not a creditor of the drawee, can suffer no damage from the insolvency of the drawee, or consequently from the want of protest, or from the want of notice of protest, so he cannot complain of this default, nor can he on pretext of this default, by which he has sustained no injury as against the drawee, excuse himself from the obligation to reimburse to the holder the amount of the unpaid bill. This decision holds, whether the drawee has accepted or not; because, though by his acceptance he renders himself a debtor to the holders of the bill, he enters into no engagement with the drawer, who has remitted him no funds."

A much older writer, *Casaregius* (*De Commercio, Disc. 54.*), says, "Propterea pro regulâ tradimus, quod, ubi in facto appareat nihil omnino fuisse profutura prædicta protesta, vel ob decoctionem scribentis (the drawer of the bill of exchange), vel solvere debentis literas (the drawee of the bill), tum omissio vel negligentia in illis *elevandis*, vel transmittendis, nullatenus nocebit; quando enim diligentiæ prodesse non possunt, impunè valent omitti per eum qui illas facere tenebatur." With this agrees *Baldasseroni*, in his *Leggi e Costumi del Cambio*, part 2. art. 10. sec. 35.

And see the *Code de Commerce*, No. 160, 170, 171.

although the balance may happen to be against him: *Blackhan* v. *Doren*. (*a*)

The fourth plea is good. The agreement must be construed according to the apparent intention of the parties: *Stevens* v. *Curling*. (*b*) Here there is nothing to shew that the payment of the 2000*l.* was not to be a condition precedent. It could not have been intended that the defendant's 5000*l.* should be paid before any act was done on the part of the plaintiff. [*Maule* J. The allegation is, that the business could not be safely engaged in by the defendant, not by the defendant and the plaintiff.] The payment of some considerable part of the 2000*l.* must be considered as a condition precedent. [*Tindal* C. J. Why should one payment be made before the other? Should they not go step by step to a common purse?] There is no averment of readiness to advance any part of the 2000*l.* In *Varley* v. *Manton* there was a distinct averment of performance according to the terms of the agreement. [*Maule* J. There a general averment of performance was held to be sufficient upon general demurrer, although a particular averment would have been proper. Here, we have a general averment of readiness instead of a special averment.] *Glazebrook* v. *Woodrow*. (*c*)

The third plea is good. By the agreement the licence was to be obtained by the plaintiff at his costs. The obtaining of the licence was therefore, as alleged in the third plea, an essential preliminary to the successful carrying on of the trade. [*Maule* J. What is meant by a successful carrying on of the trade?] The business could not be effectually carried on without the licence, and the obtaining of the licence would be a condition of

(*a*) 2 *Campb.* 503. And see *Claridge* v. *Dalton*, 4 *M.* & *S.* 226.

(*b*) 3 *New Cases*, 355.

(*c*) 8 *T. R.* 366.

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ence could be available, it would be unreasonable require that the plaintiff should incur the expense of taining the licence until these necessary preliminaries d been secured. If it turned out that the money uld not be raised, or that the premises, on which the ce was intended to be carried on, could not be pro-ed, the licence would be perfectly useless; we must k at what the parties originally intended, in deciding ether an act should be concurrent or precedent.

Next, as to the fourth plea, was it a condition pre-ent that the plaintiff should place the 2000*l.* in the ker's hands, or was the payment of the 5000*l.* to be oncurrent act? It appears to me that both payments re to be made at the same time. The declaration tes that the plaintiff was ready and willing to perform articles; which he could not be unless he was ready d willing to do all those acts which were intended to concurrent with the payment of the 5000*l.* by the de-dant. If the fact was, that the plaintiff was not ready, was not willing to bring in the 2000*l.*, the defendant ght have protected himself by taking issue on that egation.

In declaring upon the bankers' cheque, the plaintiff s stated those circumstances which he thinks sufficient excuse him for not giving notice to the defendant of e refusal of the bankers to honour his cheque. To is count there is a general demurrer only. It is ged, that the allegations in the declaration are not fficient to excuse the want of notice, since, notwith-anding what is there stated, the plaintiff may have had just and reasonable expectation of assets coming to he hands of the bankers before the cheque was pre-nted for payment; but, upon general demurrer, it is fficient if we see that the plaintiff has excused himself on the broad ground, that the defendant had no assets

notice of nonpayment. This I think quite sufficient, — at least, upon general demurrer.

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COLTMAN J. The question raised by the fourth plea is, whether the plaintiff is entitled to sue the defendant for not bringing in the 5000*l.* The defendant contends that the payment of the 2000*l.* by the plaintiff was a condition precedent to the defendant's liability to pay the 5000*l.* It appears to me that both were concurrent acts. There seems to be no reason why the plaintiff should be called upon to pay without payment by the defendant. If the acts are concurrent, an allegation that the plaintiff is ready and willing to pay the 2000*l.* is sufficient to entitle him to maintain this action. This appears by *Levy* v. *Lord Herbert* (*a*) and other cases.

Under the third plea the defendant contends, that the procuring of the licence must be taken to be a condition precedent, because it was necessary to the carrying on of the trade. It appears to me that it would be very unreasonable to call upon the plaintiff to procure the licence, until he was satisfied that the defendant was ready and willing to advance the funds by which the licence was to be rendered available. The acts to be performed on both sides being in the nature of concurrent acts, I think it was sufficient for the plaintiff to aver that he was ready and willing to do those acts which he had engaged to do.

With respect to the second count, I think it was sufficient to allege the excuse for omitting to give notice of dishonour in the form usually adopted by pleaders. The form which has been generally made use of is that given by Mr. *Chitty*, and it seems to me to be sufficient, — at any rate, upon general demurrer.

(*a*) 7 *Taunt.* 314.; 1 *B. Moore*, 56.

ment of the 5000*l.*; nor does it appear to me that these were even concurrent acts: but, if concurrent, I think the allegation of readiness and willingness on the part of the plaintiff is sufficient. But the payment of the 2000*l.* could not be intended to be concurrent; for that sum was to be deducted from the profits of the plaintiff's share of the trade, and the circumstance of the amount being left open shews that it could not have been intended by the parties that the payment should be a condition precedent. It was clearly contemplated that either a part or the whole of the 2000*l.* might be left unpaid.

With respect to the objection raised on demurrer to the second count, it does not appear that the defendant had any account with the bankers on whom the cheque was drawn. When it is shewn that the drawee had no assets in the hands of the drawer, that is generally sufficient; *Walwyn* v. *St. Quintin.* (*a*) Where there is any thing to take the case out of the general rule, that should come from the other side.

Judgment for the plaintiff.

(*a*) 1 *B. & P.* 652.; overruling the opinion of *Eyre* C. J. at Nisi Prius, that a drawee who had deposited deeds in the hands of the drawer, for the purpose of raising money, was entitled to notice of dishonour, though no money had been raised.

1840.

FRICKER v. THOMLINSON.

Talfourd Serjt., in *Trinity* term last, obtained a rule *nisi* to enter a nonsuit on an affidavit verifying the undersheriff's notes, but in which notes the fact of the delivery of the cheeses was omitted.

Gaselee Serjt. now shewed cause, and produced an affidavit supplying the fact omitted in the undersheriff's notes. The defence under the statute of frauds should have been specially pleaded. It was so ruled in this court, in the case of *Barnett* v. *Glossop* (*a*); where, in *assumpsit* for the price of a copyright bargained and sold, it was held that a defence founded upon 8 *Ann.* c. 19. *s.* 1., which requires the transfer of a copyright to be in writing, signed in the presence of two or more credible witnesses, must be specially pleaded. In *Elliott* v. *Thomas* (*b*) it appears, indeed, to have been agreed that the defence that there is no sufficient contract to satisfy the statute of frauds may be set up under the general issue. The affidavit shewing that an acceptance of the goods had been proved at the trial is admissible: *Lilley* v. *Johnson*. (*c*) [*Maule* J. The case in the Exchequer decided that the statute of frauds only altered the evidence of the contract, and did not, like the statute of *Anne*, make the contract itself void; and, if that be so, a memorandum of the contract made after action brought would be sufficient: and why, then, should not an acceptance of goods after action brought be admissible in evidence. *Tindal* C. J. The statute says that no action shall be brought. (*d*) All that we

(*a*) 1 *New Cases*, 633.

(*b*) 3 *Mees. & W.* 170.; and see *Johnson* v. *Dodgson*, 2 *Mees. & W.* 653.

(*c*) 5 *Dowl. P. C.* 606.

(*d*) The words of the seventeenth section are, "no contract for the sale of any goods, wares, and merchandizes for the price of 10*l.* and upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents

RICHARD HOYE *v.* JAMES BUSH.

Nov. 9.

TRESPASS, for imprisoning and handcuffing the plaintiff.

Plea: Not guilty (by statute).

At the trial before *Coltman* J., at the sittings in *London*, in *Hilary* term 1839, the following facts appeared.

On the 11th of *September*, 1838, the Rev. *Henry Pepys*, a magistrate for the county of *Herts*, issued his warrant, directing the defendant, as a constable, to take *John Hoye*, charged with stealing a mare, at *Baldock* fair, on the 6th of *August*, 1838. Armed with his warrant, the defendant came to *Smithfield*, and there arrested the plaintiff, who was the party against whom information had been given, and against whom the magistrate intended to issue his warrant, and who was supposed to be called *John Hoye*. The name of the party arrested however was really *Richard*, *John Hoye* being the name of the plaintiff's father. The defendant did not prove that a felony had been committed, but he put in the warrant, of which the plaintiff had not demanded a perusal or copy.

The learned judge, in addressing the jury said, that the law would not justify the defendant's act, the warrant being against *John* and not against *Richard*, although *Richard* was the party intended to be taken; that a person cannot be lawfully taken under a warrant in which he is described by a name that does not belong to him, unless he has called himself by the wrong name; that a constable may in many cases take up a person on a charge of felony by virtue of his office as constable, and without any warrant from a magistrate;

In an action by *A.* against *B.* for false imprisonment, *B.* cannot defend himself under a magistrate's warrant against *C.*, although *A.* was charged with felony before the magistrate, and was the person against whom the warrant was intended to issue.

A demand of a perusal and copy of the warrant is in such case unnecessary.

brought against any justice of the peace, for any thing done in the execution of his office, or against any constable, headborough, or other officer or person acting as aforesaid, unless commenced within six calendar months after the act committed. By the sixth section provision is made for absolute indemnity under certain circumstances, and for protecting the officer by notice of action, and by a restriction as to the time at which actions shall be brought, but without absolute indemnity, in other cases. The object of the eighth section is quite distinct, and is intended to give protection in cases not within the sixth section. The defendant must shew, not only that he was acting in obedience to a warrant, but also that the warrant, under which he acted, was a proper one. This distinction is recognised in *Parton* v. *Williams*. (*a*) In that case a constable, acting under a warrant, commanding him to levy upon the goods of *William Parton*, took the goods of the plaintiff, his mother, believing them to belong to *William*. It was held that the constable was entitled to the protection of the eighth section, which requires the action to be brought within six calendar months. It was there conceded that the defendant was not entitled to the benefit of the sixth section, he having taken the goods of the wrong person; and the question was, whether any further protection was given by the eighth than by the sixth section. The Court held that the two sections were quite distinct, — that under the sixth section the defendant must shew a warrant strictly pursued; but that under the eighth it is sufficient if the party appear to have acted *bonâ fide*. In giving judgment in that case, *Abbott* C. J. says, that the legislature had very different objects in view in the sixth and eighth sections of the statute: — that the sixth section is obviously intended to protect the officer in those cases only where the justice remains liable;

(*a*) 3 *B. & Ald.* 330.

1840.

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ɪrms confined to the district in which the magis-
ıd jurisdiction. These cases shew that the officer,
ɜr to be protected, must act strictly within his
:. The cases as to arrest on civil process are in
A person arrested by a wrong name is entitled
ıtain an action (*a*), or he may apply to be dis-
l: *Smith* v. *Innes.* (*b*) In *Coles* v. *Gum* (*c*),
JOHN Thomas Gum was arrested by the name of
Thomas Gum, the court set aside the bail bond,
the defendant had executed by the name of
Thomas Gum, notwithstanding that it was clear
ɜ defendant, though taken by a wrong name,
ɜ party intended to be arrested. The true test
to be,—what would be the position of the parties
were resistance to death? It must be contended,
ɔther side, that it is competent to the defendant
', by parol evidence, that the plaintiff was the
ıtended to be arrested. Is killing to be murder
ɜlaughter, according as you may be able to shew
ɜ person arrested was or was not the party *in-*
Is obedience to a warrant, which, on the face
nstrument, does not apply to the party, to be
l? and where is it to stop? There may be a
in the surname, and the christian name right:
be contended that the party of a different sur-
ight be arrested under such a warrant? Such a
ɾould be exceedingly unsafe. It would be most
ɔ hold, that a justification is to be established, not
ing the guilt of a party arrested, or by shewing
was the person named in the warrant, but by
to make out that he was the person whom the
ıte directing the arrest, had in his mind's eye.
estion is, whether an officer can justify on the
that in the mind of a prosecutor, who is not

de post, 790. (*b*) (*c*) 1 *Bingh.* 424.; 8 *B. M. & S.* 360. *Moore*, 526.

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t the plaintiff was the same person as the party whom the warrant was made out. It was indeed by the learned judge, that the person taken was the ntended to be arrested; and the question is whehen the person intended to be arrested is taken by cer, a mere mistake in the name can deprive the ble of the protection of the warrant. A party cts *bonâ fide* under a warrant legally issued, not to be liable to an action because there is a in the name of the party.

laid down by Lord *Hale*, that if the name be m, you may give the best description you can. (*a*) t necessary that the name should be inserted in rrant at all. A man who breaks open a house country, and is apprehended, is not to be dis- because the magistrate does not know his But supposing a bystander says that the name party in custody is *J. P.*, and he is committed by me, would the magistrate be liable to an action? *l* C. J. There the party would be justified with- warrant.] There is no distinction between the one of the names being wrong, and that of both wrong. The warrant must be against a given ual. If the officer takes up the wrong individual, a person bearing the same name, he is a tres- ; but where the right person is taken, a mistake name is immaterial. [*Tindal* C. J. You assume e plaintiff was the man.] The magistrate may nformed the plaintiff that the son, and not the was to be taken.

dministering the criminal law, a magistrate must th the parties who are brought before him ac- to the best of his ability. In *Cole* v. *Hindson* (*b*) held, that where the goods of *A. B.* are taken

(*a*) 2 *Hale P. C.* 114. (*b*) 6 *T. R.* 234.

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That is contrary to *Foster*. (*a*)] In a great majority of the cases in which a mistake in the name may occur in a warrant, the officer commanded to make the arrest will not know that any such mistake exists. *Foster* puts the case of a mistake in the name in the same class as a case in which the name is inserted after the warrant is signed.

There is a distinction between a warrant bad on the face of it, and one in which there is merely a mis-statement as to a matter of fact. Where the information gives the name of the individual as it appears in the depositions, if the warrant pursue the information it must be a good defence to a party acting under it. The magistrate cannot be bound to know the true name of the party against whom he takes depositions; but he is bound to see that his own warrant is correctly framed. No objection to the warrant is raised here. If the constable were resisted in an attempt to arrest under such a warrant, an important question might occur, whether the offence amounted to murder or was manslaughter only. If the party knew that he was the person against whom the warrant was intended to issue, it would be difficult to say that he would be justified in resisting the warrant; *Rex* v. *Howorth*. (*b*) Supposing a party has two christian names (*c*), can the omission of one reduce the offence of killing the officer from murder to manslaughter? The officer receiving a warrant which is good in the face of it, is bound to execute that warrant. [*Coltman* J. This point was not raised at the trial.] That was the whole case at the trial. But for the warrant the constable would have had no protection at all.

The plaintiff should have demanded a perusal and copy

(*a*) *Fost. C. L.* 312.

(*b*) *Moody C. C.* 207.

(*c*) Strictly speaking no one has *two* christian names. If a person be baptized as *John Thomas*, *John-Thomas* forms one entire christian name. So the compound name is entire, though it be acquired after baptism, as at confirmation, or before or without baptism, by reputation only.

point. That case is stronger than the present, because there the plea averred that *Aquila Cole* and *Richard Cole* were the same person. So in *Shadgett* v. *Clipson* (*a*), it was held that a sheriff's officer could not justify an imprisonment of *A. B.* under a *latitat* against *C. B.*, though it was averred that *A. B.* and *C. B.* are one and the same person, there being no averment that *A. B.* was known by the name of *C. B.* Then what distinction can be made between civil and criminal process? If the warrant of the sheriff will not justify the officer, why should a magistrate's warrant? In either case the object of the warrant is to identify the party who is to be arrested. The judgment of *Lawrence* J. in *Cole* v. *Hindson* shews that no such distinction would be made. (*b*) That learned judge cites the opinion of *Foster*, which was in a criminal case, as governing the case of *Cole* v. *Hindson*. The case of *Rex* v. *Hood* (*c*), is also very much in point. In that case the warrant directed the constable "to arrest —— *Hood* by whatsoever name or names he may be called, being one of the sons of *Samuel Hood*." It appeared that *Samuel Hood* had four sons living together. But it also appeared from the surrounding circumstances that *George Hood*, the party taken, was the right person. The court held that the warrant ought to have stated some reason for omitting the christian name, and to have supplied some particulars by which the individual might be distinguished from his brothers, and that not having done so it was bad, and gave no authority to the constable to arrest *George Hood*. In that case, as in the present, the defendant was held not to have brought himself within the protection of the warrant, by shewing that the party arrested was the person to whom the warrant was really intended to apply. It is said that it will be attended with dangerous consequences, if felons can escape

(*a*) 8 *East*, 328.
(*b*) 6 *T. R.* 236.
(*c*) 1 *Ry. & Mo. C. C.* 281.

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BOSANQUET J. I am also of opinion that the rule must be discharged. The first question raised is, whether the defendant was justified in arresting the plaintiff under the warrant. It was not shewn that the party taken under the warrant had really committed the felony, and he was not the person described in the warrant. It is said that the plaintiff was the person intended by the justice who made out the warrant. But the directions of the justice were given in writing, and the defendant was not directed to take the person whom he did take. It is suggested that the defendant may have received verbal directions from the magistrate, identifying the plaintiff as the party to whom the warrant was intended to apply. If this were so, still the plaintiff would not be a person taken "in obedience to a warrant," and the defendant would therefore not be within the protection of the statute referred to, which applies to cases where the act complained of is *bonâ fide* done in obedience to a warrant. It is clear that in the case of *civil* process, the defence set up would be no justification. To the authorities cited on that point may be added the case of *Morgans* v. *Bridges* (*a*), where *Maurice* Barnett, the real debtor, and who at the time of contracting the debt, gave his name as *Godfrey* Barnett, was arrested under a writ issued against *Godfrey* Barnett. It was held that the sheriff was not bound to detain *Maurice Barnett* under this writ, and that he was therefore not liable to an action for suffering *Maurice Barnett* to escape. The effect of the decision in that case is plainly this, that the writ was bad; as otherwise the action would have lain for the escape. That was a case of *civil* process, but the rule is exactly the same with respect to *criminal* process. In *Rex* v. *Hood* (*b*), the person taken was the person who had

(*a*) 1 *Barn. & Ald.* 647. (*b*) *Suprà*, 782, 785.

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The second point is, whether the defendant, though not justified by the warrant, is entitled to the protection of 24 *G.* 2. *c.* 44. *s.* 6. The object of that section was to meet a difficulty, which occurred frequently in practice, where the officer acted under the warrant of a magistrate who had no jurisdiction. Here, the defendant does not act under a warrant.

MAULE J. I am of the same opinion. The first defence set up is, that the defendant acted under a warrant which he substantially obeyed. In *Cole* v. *Hindson* (*a*) *Lawrence* J. says, "In *Foster* 312., it is said, 'If the process be defective in the frame of it, as if there be a mistake in the name or addition of the person on whom it is to be executed, or if the name of such person or of the officer be inserted without authority and after the issuing of the process, or the officer exceed the limits of his authority, and be killed, this will amount to no more than manslaughter in the person whose liberty is so invaded.'" In this judgment Mr. J. *Lawrence* vouches the opinion of a judge of high authority. I am of opinion that the warrant affords no justification.

Then it is said that, at all events, this is so far a valid warrant as to bring the case within the purview of 24 *G.* 2. *c.* 44. *s.* 6. The provisions of the sixth section cannot be made to apply to the present case. The object of that section is to protect the officer, notwithstanding any defect of jurisdiction in the justice, upon the production of proof of the warrant. Supposing this section to receive the construction contended for, it would follow, that in a case where a man had been improperly arrested, the officer would be protected, although the party was without remedy against the magistrate; and the effect of the section would be to

(*a*) 6 *T. R.* 234.

1840.

ABBOTT *v.* HENDRICKS.

Nov. 23.

ASSUMPSIT, by the payee against the maker, of a promissory note, dated the 8th of *February*, 1837, whereby the defendant promised to pay to the order of the plaintiff 500*l.* two years after the date thereof. The consideration expressed on the face of the note was, for commission due to the plaintiff for business transacted for the defendant.

The defendant pleaded, that he made and delivered the note in the first count mentioned, for and in consideration of certain services to be *thereafter* done and rendered by the plaintiff for and on behalf of the defendant, and for no other consideration whatever; that the plaintiff had not done or rendered the said services for and on behalf of the defendant, but had neglected and refused so to do, and by reason thereof the consideration for the making and payment of the said promissory note had wholly failed; and that, save and except as aforesaid, there had never been any consideration for the said promissory note. Replication: *de injuriâ.* (*a*)

At the trial at the sittings in *London* before *Vaughan* J. in *Easter* term, 1839, the defendant sought to show that the consideration for the note was not, as expressed on the face of it, commission for business transacted, but commission to become due on future services, which had never been performed. On the part of the plaintiff it was objected that parol evidence could not be given to

Where in an action on a promissory note in which the consideration was expressed to be "for commission due to the plaintiff for business transacted for the defendant," the defendant pleaded that the real consideration for the note was services to be *thereafter* rendered by the plaintiff which had never been performed, and the plaintiff replied *de injuriâ*; Held, that evidence in support of this plea was admissible, and ought to have been received by the judge at the trial.

* As to the sufficiency of the plea, — in which it was not alleged that the time for performing the services had elapsed, — *quære.*

(*a*) As to the replication, *de injuriâ*, in *assumpsit*, *vide antè*, 720.; *Humphreys* v. *O'Connell*, 7 *Mees.* & *Welsb.* 370.

ing and undetermined. It was held, on demurrer, that the plea was bad, for not shewing that the agreement for varying the absolute contract expressed in the bills, was in writing. Lord *Abinger* there says, (*a*) "It would be very dangerous to allow a party to alter, in such a manner, the absolute contract on the face of a bill of exchange. The effect of the cases is, that you are estopped from saying that you made any other contract than the absolute one on the face of the bill. A contract which seeks, by subsequent oral matter, to discharge altogether the contract created by the bill, and create a new one, is wholly different, and may, no doubt, be given in evidence; it is consistent with the bill; but this is a contract inconsistent with the bill." *Foster* v. *Jolly* is to the same effect. (*b*) In *Rawson* v. *Walker* (*c*), it was held that where a promissory note, on the face of it, is payable on demand, evidence cannot be adduced by the maker to shew a liability on a contingency only. So, in *Woodbridge* v. *Spooner* (*d*), where a promissory note purported to be payable on demand, it was decided that parol evidence was not admissible to shew that at the time of making the note, it was agreed that it should not be payable until after the decease of the maker. Undoubtedly there are some authorities the other way; *Solly* v. *Hinde* (*e*), and *Thompson* v. *Clubley* (*g*); but those cases are distinguishable from the present.

Bompas and *Channell* Serjts., in support of the rule. The evidence offered on the part of the defendant was, to shew an entire want of consideration, and not to vary

(*a*) 1 *Mee & W.* 380.
(*b*) 5 *Tyrwh.* 239.; 1 *Crom. M. & R.* 703.
(*c*) 1 *Stark. N. P. C.* 361.
(*d*) 3 *B. & Ald.* 233.
(*e*) 4 *Tyrwh.* 805.; 2 *Cr. & M.* 516.
(*g*) *Tyrwh. & G.* 482.; 1 *Mee. & W.* 212.

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was no consideration, so where a special consideration is stated, I think he is at liberty to shew that it has failed.

BOSANQUET J. I am of opinion that the evidence tendered was not rendered inadmissible by reason of the statement contained in the note. It is true, that the terms of a contract cannot be varied by a parol agreement; but the want of a consideration, or the illegality of the consideration, is a good defence in an action on a promissory note. Although a note is expressed to be given for a good consideration, it may be shewn, either that there was no consideration, or that the consideration was illegal. If it were competent to parties to exclude such evidence, it would be contrary to every principle of justice. It is the constant practice to admit it; and yet I do not see why it ought not to be excluded, if the statement contained in the present note is to shut out the evidence tendered at the trial.

COLTMAN J. I have always understood the rule to be, that although you cannot vary the terms of a note by parol evidence, you may give evidence to shew either that it was originally made without consideration, or that the consideration has failed. This is fully borne out by the authorities that have been cited. With respect to the cases referred to on the part of the plaintiff, they are distinguishable, on the ground that in those cases the evidence sought to be introduced, did not refer to the consideration, but went to vary the terms of the contract. It seems to me, that there was a miscarriage in this case, in not admitting the evidence offered at the trial.

MAULE J. I also think that the evidence in question ought to have been received. That evidence was tendered to shew that the note was given for services to

clearly inadequate to compensate the plaintiff for the injury he had sustained; and cited *Chambers* v. *Caulfield* (*a*) to shew that where a jury have acted under error or misconception in awarding damages, there is sufficient ground for submitting the case to the consideration of a second jury.

TINDAL C. J. The real ground of this application is, that the damages are not sufficient to carry costs. If the jury had given the plaintiff a verdict for 40*s.* we should never have heard of the case. The question of costs not being a matter which the jury ought to take into consideration, the only ground on which we could grant a new trial would be the insufficiency of the damages. It is urged that a shilling is not an adequate compensation for the injury sustained by the plaintiff, but if that be so, it is clear that 40*s.* would not be sufficient. The jury considered that the plaintiff was entitled to a verdict which would set his character right with the world; but they may have thought that he had sustained very little injury indeed from the speaking of the slanderous words. I think that there is no legal ground on which the verdict can be set aside.

BOSANQUET J. I am of opinion that there is no ground for disturbing this verdict, the propriety of which must be considered without reference to the question of costs, with which the jury had nothing to do. If they had given the plaintiff damages to the amount of 40*s.*, there can be no doubt that no objection would have been urged against the verdict.

COLTMAN J. The question for the jury was, what injury the plaintiff had sustained; and they appear to have thought that he had sustained none, as the

(*a*) 6 *East*, 244., 2 *J. P. Smith*, 356.

1840.

DAVIS *v.* The LONDON and BLACKWALL Railway Company.

Nov. 11.

In an action on the case against a railway company for an injury to the plaintiff's house by reason of an adjoining house falling against it, the breach alleged in the declaration was, that the company did not use due care or skill, or take proper precautions in making the railway and excavations, and that they so carelessly &c. proceeded in making the railway and excavations, without taking due care and precautions to prevent the said house so near to the house of the plaintiff from

CASE. The declaration stated that the plaintiff, before and at the time of the committing of the grievances thereinafter mentioned, was possessed of a certain house, situate &c., and occupied the same, and therein carried on his trade and business of a gunsmith; that before and at &c., the company were engaged in the making of a certain part of a certain intended railway near to the said house of the plaintiff, and near to a certain other house in the county aforesaid, situate near to the said house of the plaintiff, and were also then employed in making certain excavations in the earth near to the foundations of the said house so near to the said house of the plaintiff as aforesaid; and thereupon it became and was the duty of the said company to use due care and skill, and to take due, reasonable, and proper precautions in and about the making the said excavations, so that for want of such care, skill, and precautions, the said house of the plaintiff, and his tools and implements of trade, goods and chattels therein, might not be damaged or destroyed, or the plaintiff injured in respect thereof. Yet the said company, not regarding their duty in that behalf, but contriving and intending to injure the plaintiff, did not nor would use due care or skill, or take due reasonable or proper precautions in or about the making the aforesaid part of the railway, or in or about the making of the said excavations upon the occasion aforesaid, according to

falling upon and against the said house of the plaintiff, that by reason of the careless, negligent, unskilful, and improper conduct of the company, and for want of due and proper precautions by them on the occasion aforesaid, the said house so near &c. gave way, and fell upon and against the house of the plaintiff, whereby &c. On general demurrer, held sufficient.

amount of 20*l.*, in having his house examined, and the nature and extent of the said damages, injuries, and losses ascertained, and in and about the removal of the ruins of his said house, and of such of his goods and chattels as were not wholly destroyed, and in and about the procuring of another residence, and otherwise in relation to the premises and matters aforesaid, &c.

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DAVIS v. The LONDON and BLACKWALL Railway Company.

General demurrer and joinder.

Bompas Serjt. (*W. J. Alexander* was with him) in support of the demurrer. The declaration does not shew a breach by the defendants of any duty imposed on them by law. It is not averred that the adjoining house fell by reason of the defendants' making the railway in an improper manner. The declaration charges that the defendants constructed the railway without preventing one house from falling against the other, and not that they so improperly made the railway that the adjoining house fell against the plaintiff's. The real question on the declaration is, whether it was the duty of the defendants to take precautions to prevent the one house from falling against the other; but no such duty is disclosed. [*Tindal* C. J. As this is a general demurrer to the whole declaration, if any part of it shews a good cause of action, it is sufficient.(*a*)] As the damage is stated to have arisen from two breaches, if one is bad, the whole declaration is bad. (*b*) [*Maule* J. Two things are averred; one, that the adjoining house gave way from want of due precaution, and the other, that it fell against the plaintiff's house: if those allegations were traversed, and it could be shewn that the house fell without the default of the defendants, there would be no cause of action.]

(*a*) The judgment would be, that the plaintiff should recover as to that part, and be barred for the remainder, *antè*, 201. (*a*)

(*b*) *Sed vide antè*, 201. (*a*)

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abstract of the title, &c.; 7th, that in case any purchaser should raise objections to the title, not provided for by the conditions, and which the vendors should not be able or willing to remove, and the purchaser should insist upon such objections, the vendors should be at liberty, by writing under their hands, to rescind the contract for the lot or lots bought by such purchaser, on repaying to such purchaser his or her deposit money, without interest or costs; and that all objections which should not be taken in writing, within ten days after the delivery of the abstract, should be considered as waived: that, on such exposure to sale, the plaintiff became and was the purchaser of the said several tenements, &c., for a certain sum, and paid the deposit and proportion of auction duty, &c.; that on, &c., in consideration that the plaintiff, at the request of the defendants, had then promised the plaintiff to perform and fulfil all things in the conditions of sale contained on the plaintiff's part, as such purchaser as aforesaid, to be performed and fulfilled, they, the defendants, promised the plaintiff to perform and fulfil all things in the conditions of sale contained on the part of the vendors to be performed or fulfilled, and also that they, the defendants, could and would make to the plaintiff a good and sufficient title to the said reversionary estates and interests so purchased by him as aforesaid, subject to, and according to the effect and meaning of, the said conditions of sale. Breach: that the defendants did not nor would within twenty days after the said sale, or at any time afterwards, deliver to the plaintiff or his solicitor an abstract of the title of the defendants, according to the tenor &c. of the said conditions of sale, and that the defendants could not at any time make to the plaintiff, and had not made to him, a good or sufficient title to the said reversionary estates and interests, or any of them, or any part thereof, subject to, and according to the effect and mean-

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within ten days after the delivery by the defendants of the said abstract of title in the seventh plea mentioned, take objections to the said title in writing, according to the true meaning of the said conditions of sale, and that such objections were within such period of ten days aforesaid taken, and communicated to the defendants by the plaintiff: concluding to the country.

Special demurrer to this replication, assigning for causes, that the replication, introducing new matter, ought not to have concluded to the country, but with a verification; and that the replication neither confessed and avoided, nor properly traversed the plea.

Joinder in demurrer.

Byles, in support of the demurrer. The plea states that the defendants, within twenty days after the sale, delivered an abstract of the title, and that the plaintiff did not within ten days take any objections in writing to such title. Instead of denying both or one of these allegations, the plaintiff replies by introducing new matter, namely, that the defendants did not disclose "a good and sufficient title" in the abstract, and consequently the replication should have concluded with a verification. [*Tindal* C. J. Does not the replication in substance traverse the second allegation in the plea? Supposing the replication had concluded with a verification, could you have gone to trial on any other issue than that raised?] The replication alleges that the abstract did not shew a sufficient title, so that in effect the issue raised would be twofold; first, as to the sufficiency of the abstract; and secondly, as to the delivery of the objections within the specified time. [*Tindal* C. J. What is alleged with respect to the insufficiency of the title has nothing to do with the issue to be tried. All that the jury would have to decide would be, whether the objections were delivered within ten

1840.

BARWELL *v.* ADKINS.

Nov. 3.

ASE, for a libel published by the defendant in the *Northampton Herald.* Plea: Not guilty.

The declaration stated that the plaintiff was an iron-under, and had been appointed by one *A. M. Perkins* agent for the manufacture and sale of an apparatus r the warming of buildings by means of hot water, which *Perkins* had obtained letters patent; that the aintiff, as such agent, and in the way of his trade, had ected the said apparatus at the Lunatic Asylum for e county of *Bedford*, for the warming thereof. The el complained of was as follows: — "Bursting of e of *Barwell*'s hot-water pipes at the *Beds* Asylum. n the evening of yesterday week one of this man's mfortless inventions burst at the above institution. ortunately none of the patients were near at the time; d as the vigilant eye of the matron made the dis-very immediately on the accident taking place, no one stained any injury. From the above accident, it be-ves the magistrates of *Bedfordshire* to protect the happy inmates of the county asylum from being alded, in addition to their other afflictions. From a rrespondent."

At the trial before *Coltman* J., at the *Middlesex* sit-gs after last term, the libel having been proved, the unsel for the plaintiff proposed to put in a paragraph, bsequently published in the same newspaper, affirming at the libellous matter was true. This was objected to the part of the defendant; but the learned judge ought that the second paragraph was admissible to ew the intention of the defendant in publishing the el declared on; and in his summing up he told the

On the trial of an action for a libel published in a newspaper, the plaintiff was allowed to give in evidence a second paragraph subsequently published in the same paper, in which the libellous charge was reasserted, for the purpose of shewing the defendant's intention; and in leaving the case to the jury, the judge told them to take the two paragraphs with them, and to give the plaintiff such damages as they considered him entitled to under the circumstances. An application for a new trial, on the ground of misdirection, was refused.

they were of opinion that the first paragraph was malicious, that they were to give the plaintiff damages for that paragraph alone.

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BARWELL v. ADKINS.

BOSANQUET J. The second paragraph was admissible to shew what the intention of the defendant was in publishing the first. The jury could not have misunderstood the learned judge.

The rest of the court concurred.

Rule refused.

TYRRELL *v.* WOOLLEY and ROTHWELL.

Nov. 19. 22.

ASSUMPSIT, by the plaintiff, a member of a benefit society called "The Union Benefit Society," to recover from the defendants, one of whom was the secretary, and the other a member of the committee of management of the society, for money had and received by the defendants to the use of the plaintiff.

By one of the rules of a benefit society, the committee were to meet "for the purpose of examining candidates for admission, and to settle and determine any matter relating to the breach or non-observance of the articles of the society by any of its members, and their exclusion in consequence thereof, and to settle and determine *any other matter or thing relating to the society*, subject nevertheless to the confirmation of the society at their next quarterly meeting."

Held, that the latter words were to be considered in conjunction with, and as qualified by, the preceding portion of the rule; and that they did not authorise the committee to enter into a contract which was in violation of the other rules of the society, *dubitante Maule* J.

The other rules established a graduated scale of allowance to sick members, regulated by the state of the funds of the society, and by the period that the members continued a charge upon it, and prohibited them from working while they received such allowance; and also provided for the payment of certain sums on the death of a member, or of a member's wife.

Held, that the committee were not authorised in making a contract with a sick member (who had met with an accident which disabled him from working at his trade), allowing him a fixed weekly sum for life, with permission to attend to any business that he might be able to transact, in consideration of his giving up all further claim on the society during his life, and at his decease, *dubitante Maule* J.

Held also, that the society, which was established before the 10 *G.* 4. *c.* 36., could not enter into any engagement, so as to bind the then members and also those who might afterwards become members of it.

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TYRRELL v. WOOLLEY.

in arrear and unpaid, contrary to the promise of the defendants, whereof the defendants had always had notice; and that they were duly requested to pay him the said weekly sum or allowance, but that they had always neglected and refused, and still neglected, &c. There was also a count upon an account stated.

Plea: *non assumpsit.*

At the trial before *Vaughan* J., at the *Middlesex* sittings in *Easter* term, 1839, the following facts appeared:

The plaintiff, who was a carpenter by trade, and had been admitted a member of the society in 1812, met with an accident in 1822, which rendered him incapable of working at his business. He accordingly applied to the society, and received the usual weekly allowance to which sick members were entitled by the rules, until the 5th of *January* 1825. Members receiving relief being restricted by the rules of the society from applying themselves "to any manner of business," the plaintiff made an application to the committee for a pension of 7*s.* per week, with liberty to follow any employment that he might be able to obtain, and proposed to give up the sum which his widow or nominee would be entitled to at his decease, and also his claim to the 10*l.* which would be payable on the death of his wife. This proposition being agreed to, the committee, on the 17th of *November* 1824, passed the subjoined resolution: —

"That *James Tyrrell* be allowed 7*s.* per week for life, with permission to attend to any business that he may be able to transact, on consideration of his giving up all further claim on the society during his life (including his wife's death-money), and also relinquishing all claim on the society at his own decease.

"Witness, *I. Sheppard,* (Signed) *James Woolley,*
"*S. Rothwell.* Secretary."

heir names stand in rotation in the society's book, who hall meet together whenever summoned by the secretary, or the purpose of examining candidates for admission, nd to settle and determine any matter relating to he breach or non-observance of the articles of the ociety by any of its members, and their exclusion in onsequence thereof; *and to settle and determine any ther matter or thing relating to the society*, subject evertheless to the confirmation of the society at their ext quarterly meeting; and in cases where any mem- er or members shall have been excluded by the com- nittee, such excluded member or members shall be at iberty, on the quarterly night following, to appeal to a pecial meeting of the society to be called by the ecretary, for the purpose of re-hearing, as well as he charge or charges brought against them, and the vidence in support thereof, as the defence set up by he member or members so appealing as aforesaid: rovided nevertheless, that the appeal is made before he minute for his or their exclusion is confirmed." The rest of the rule related to fines for non-attendance, &c.

9. "Every sick member, who shall declare on the box of this society, and who shall be unable to work, shall, in case the stock of the society amounts to 1000*l.* sterling, be entitled to receive 18*s.* per week for twenty-six weeks, 12*s.* per week for other twenty-six weeks, 7*s.* per week for so long as the sick member shall remain unable to work; but in case the stock shall be under 1000*l.* sterling, then the allowance to sick members shall not exceed 11*s.* per week for the first twenty-six weeks, 10*s.* per week for the following twenty-six weeks, 6*s.* per week for so long as he shall be unable to work. No member on the box shall be liable or subject to pay subscriptions or fines."

13. "If any member, while receiving the benefit of

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the defendants; first, that *Woolley* could not be held personally liable, having dissented to the resolution of the 17th of *November* 1824, both when it was originally passed, and when it was confirmed; secondly, that the act of the majority could only bind the society where it was in accordance with the rules; and that the committee had no authority by such rules to come to the resolution in question; thirdly, that the contract not being one that could be performed within a year, there was no sufficient signature to the resolution to satisfy the statute of frauds, 29 *Car.* 2. *c.* 3. *s.* 4.; fourthly, that the plaintiff was a partner with the defendants, and consequently incapacitated from suing them; and, fifthly, that the plaintiff's only remedy, if any, was by arbitration, pursuant to the 10 *G.* 4. *c.* 56. *s.* 27.

A verdict was taken for the plaintiff for 11*l.* 18*s.*, the amount claimed, leave being reserved to the defendants to move to enter a nonsuit on any of the above points.

Talfourd Serjt. having accordingly obtained a rule *nisi*,

Kelly and *Martin* now shewed cause. This is an action by the plaintiff who was formerly a member of a benefit society to recover from the defendants a weekly sum, which they and the other members of the society promised to pay him under an agreement for which there was a good consideration. The first objection taken at the trial was, that the defendant *Woolley* had dissented from the resolution come to by the committee. It is submitted, however, that in benefit societies, as in other associations composed of a number of members, the act of the majority is the act of the whole body, provided that such act be in accordance with the rules of the society. No notice was ever given to the plaintiff

business of the society for the committee to take the plaintiff's claims into consideration, and to settle them by agreeing to pay him a small fixed weekly sum. The contract with the plaintiff was clearly within the scope of their authority, and that contract was afterwards duly confirmed at a general quarterly meeting. [*Maule* J. If it appeared on the evidence that the members of the society, as a fluctuating body, were to pay the 7*s.* a week, then the contract is not correctly stated in the declaration.] The promise laid in the declaration is, not that the members shall pay, but that the society shall pay the money. [*Maule* J. The committee could not bind the society except under some act of parliament; they could only bind the then existing members.] With respect to the objection under the statute of frauds, it cannot be said that the resolution was an undertaking for the debt, default, or miscarriage of another; for it was a new and original undertaking on the part of the defendants, founded on the plaintiff giving up his claims upon the society. Neither can it be urged that this is a contract that was not to be performed in a year; and must, therefore, on that ground, be in writing. It is sufficient if the contract might, by possibility, be executed within a year; *Gilbert* v. *Sykes* (*a*); *Wells* v. *Horton* (*b*). But if requisite, there is here a memorandum of the contract in writing, signed by the parties to be charged, so as to satisfy the statute of frauds. The signature of the two defendants to the letter communicating the resolution to the plaintiff, was a direct compliance with the statute; besides which, the signature of the defendant *Woolley*, as a witness to the memorandum whereby the plaintiff accepted the terms proposed, was a sufficient signature to bind himself, as also, by his agency, to bind the other defendant.

(*a*) 16 *East*, 150. (*b*) 4 *Bingh.* 40.; 12 *B. Moore*, 177.

At any rate that statute cannot be rendered available as a defence without being specially pleaded.

Talfourd and *Channell* Serjts., in support of the rule. The plaintiff, who clearly was a memberof the society up to the time that the agreement was made, and must have been cognisant of the rules, cannot enforce a contract, which, independently of the question of his being a partner with the defendants, was in direct violation of those rules. If the plaintiff ceased, by the agreement, to be a member of the society, it must be contended that the majority could bind the minority, and could discharge the plaintiff from his liabilities to the society. But a minority can only be bound where the act of the majority is in accordance with the rules of the association. A majority of a firm cannot buy out one of the body, contrary to the regulations of the partnership, and against the consent of the minority. Here, the contract was an improvident one, which the committee had no authority to make. Not only was the plaintiff to receive a fixed sum for life, instead of a mere allowance while he was sick, but he was to be exempt from contributing to the funds of the society, and was also to be at liberty to attend to any business that he could transact. The words in the fifth rule, "to settle and determine any other matter or thing relating to the society," are relied on as giving the committee authority to enter into the contract with the plaintiff; but those words must be read in connection with those which come immediately before and after, and with reference to the other rules of the society. It never was intended by that rule to give the committee power to alter the general regulations of the society, the object of the rule being to settle breaches of the existing articles. The general regulations could only be changed in pursuance of the twenty-fifth rule, which provides

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In order to enable the plaintiff to sustain the action, the defendants must be liable, either as members of the society or in their individual characters. There is no plea in abatement. It seems to me, that the committee had no authority under the fifth rule to enter into the contract in question. That rule is headed "The mode of appointing the general committee, their duties and fines." It provides that the committee shall meet whenever summoned, for the purpose of examining candidates for admission, and to settle and determine any matters relating to the breach of the articles of the society by any of its members; "and to settle and determine any other matter or thing relating to the society." It appears to me that the latter words on which the argument turns must be confined and limited to matters within the rules, and cannot be constructed so as to extend to a contract which is in violation of those rules. The contract, in many respects, violates the rules. It gives the plaintiff an annuity for life; it also exempts him from contributing to the funds of the society, and from incurring the forfeiture of his weekly allowance in case he applies himself to any kind of work. It seems to me that the committee, in entering into this contract, exceeded their authority, and that the society are not bound by their act. Then are the defendants bound in their individual characters? It is impossible not to see that there was no intention on either side to make them personally liable. It is clear that the plaintiff never meant to give up the claim he had upon the funds of the society for the personal security of the defendants; and that the latter merely meant to make themselves liable in common with the other members of the society. The form of the resolution and the signature to it of one of the defendants as secretary, shew that both parties looked upon it as an act of the committee on behalf of the society. If the argument of the

society within the extent limited by the general regulations of the society; and when they went beyond the scope of these regulations, they exceeded their authority. If that were not so, the committee might violate every rule in detail; and thus render nugatory the provisions of the twenty-fifth rule, prescribing the manner in which the general rules are to be altered. I am of opinion, that the resolution passed by the committee was not within the authority given to them by the fifth rule, and consequently, that it is not binding on the defendants as members of the society. The question then arises, are the defendants bound individually? I have felt strongly throughout the case, that it never was the intention of either party, that the defendants, by entering into the contract, should make themselves personally liable. It is clear that the defendants never thought that they were bound, otherwise than as members of the society, and that the plaintiff never looked for any other remedies than those which the law gave him against the funds of the society. I therefore think that the defendants are not personally liable upon the contract. We have been pressed by the case of vestrymen, who, it is said, may be sued on resolutions of the vestry. But it is to be observed that the contracts entered into in pursuance of such resolutions, are contracts which the vestry have power to make, and that they are made with third parties. Here, the plaintiff was a member of the society, and must be taken to have been perfectly cognisant of its rules.

MAULE J. I also am of opinion that this verdict cannot be sustained. In coming to that conclusion I do not rely—as the rest of the court have done—upon the resolution in question not being within the scope of the fifth rule; for it does not appear to me to be perfectly clear that the committee had not power to enter into such a contract as they intended to make by that

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Morgan and Another *v.* Miller and Another.

THE plaintiffs obtained a rule *nisi* for setting aside an order of *nisi prius*, which had been made a rule f court, by which this cause and a suit in chancery ere referred to arbitration; and the defendants ob- ained a rule *nisi* for an attachment against the plaintiffs or their contempt in disobeying the rule of reference. On hearing both rules this court ordered, that the laintiffs should be at liberty to proceed to the trial of he cause on payment by them "of the costs of the day, nd of the costs of and occasioned by the applications the court." On taxing the bills of costs, the master efused to allow, as part of the costs of the day, charges or the costs of a special jury, and for the costs of an pplication to the judge at Nisi Prius to fix a particular ay for the trial. He also refused to allow, as part of he costs of and occasioned by the applications to the ourt, charges for consultations and conferences pre- aratory to those applications, and for a short-hand riter's notes of certain motions made in the chancery uit, the particulars of the discussions upon which otions this court required to be produced for their formation upon the argument of the cross motions.

Under a rule of court ordering that the plaintiff shall be at liberty to proceed to trial on payment to the defendant of the costs of the day, and of the costs of and occasioned by certain applications to the court, the defendant is not entitled to the costs of a special jury, — of an application by the defendants to put off the trial, — of consultations antecedent to, and in preparation for the applications mentioned in the rule, — or of a short-hand writer's notes of a discussion upon motions in Chancery, which notes were afterwards brought before the court in consequence of an intimation that the court would require to be furnished with information respecting such motions.

Wilde S. G., on behalf of the defendants, having ob- ained a rule *nisi* for reviewing the master's taxation,

Talfourd Serjt., and *Kelly* now shewed cause. The osts of a special jury could be given only upon the ertificate of the judge; they are never taxed as part of

osts upon so liberal a scale. The costs of the appli- ation to put off the trial were occasioned by the de- ault of the plaintiffs, in not depositing with the clerk in ourt, papers which the court had directed to be so de- osited. Equity barristers attended the consultations, nd were heard in court upon the rules. The consult- ions were occasioned by the applications to the court, eing held with reference to those applications. Without ie assistance of a short-hand writer, the defendants ould have been unable to lay before the court a correct atement of what had taken place in the court of chancery. ' they had resorted to less satisfactory sources of in- rmation, they might possibly have been met by counter atements. A transcript of the short-hand writer's otes was looked at by the court, and there is no reason hy the reimbursement of the defendants should be nited to that small portion of the notes which was nbodied in the defendants' affidavits.

TINDAL C. J. This must be regarded as being, in sub- ance, an application to alter the form of the rule pro- ounced between these parties. That rule was framed ter great consideration, and a draft of it was signed by ie counsel on both sides. No default has been shewn the master in carrying out that rule. Perhaps if the efendants had insisted upon other terms, they might ave succeeded in obtaining a rule differently framed. he rule, however, being drawn up in the usual form, think the court cannot, with propriety, put a special nstruction upon its terms.

BOSANQUET J. The question is, whether, looking at e rule as drawn up, the master has complied with the rms that it contains. The rule is drawn up in known gal terms. We cannot, upon a motion to revise tax- tion, enter into a consideration of the merits on

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Nov. 19.

CASE. The first count of the declaration alleged, that the plaintiff was possessed of a messuage, &c. at *H.*, in the county of *Derby*, in his own occupation, and of certain gardens, &c.; and that the defendant was possessed of a mill, workshop, and manufactory, near to the messuage &c. of the plaintiff; that the defendant, contriving, &c., wrongfully, &c., used, and continued to use, certain engines, furnaces, funnels, chimneys, &c., theretofore made, placed, &c., in and upon the mill, workshop, and manufactory of the defendant; and in so using and continuing to use the same, cast, projected, and expelled and put out of and from the said engines, furnaces, funnels, chimneys, &c., divers large quantities of noxious, noisome, unwholesome, offensive, and poisonous smoke, soot, &c. so near to the said messuage, gardens, &c. of the plaintiff, that the said smoke, soot, &c. wrongfully flowed upon, and entered into, and spread and diffused themselves through, the said messuage and gardens, &c., and the air over, through, and about the same, was thereby filled and impregnated with the said smoke, soot, &c., and was rendered and became, and was, and still is, corrupted, offensive, unwholesome, unhealthy, and uncomfortable and deleterious to breathing, and injurious to life; whereby the plaintiff had been and was greatly annoyed, &c.

In an action on the case for a nuisance in carrying on an offensive trade, to which the plea is not guilty, the judge has power, in the event of the plaintiff's recovering less than 40*s.* damages, to certify under the 3 & 4 *Vict. c.* 24. *s.* 2., — that the action was really brought to try a right besides the mere right to recover damages, — in order to entitle the plaintiff to his costs.

Unless it appear from the declaration, that the action could not really have been brought to try a right beyond the mere question of damages, the case is within the act; and the granting of the certificate is entirely a matter for the discretion of the judge presiding at the trial, and the court cannot review his decision.

Where an informal certificate was given immediately after the trial, it was held that the judge might amend it afterwards, as being a misprision of the officer.

Semble, that the certificate must be granted immediately after the trial is closed.

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with nominal damages. The jury returned a verdict for the plaintiff, with 1*s.* damages. His lordship being applied to for a certificate under the 3 & 4 *Vict. c.* 24. *s.* 2. (*a*), granted the application, and signed the following indorsement on the nisi prius record, "I certify that the right came in question upon the trial of this cause."

At the beginning of this term *Adams* Serjt. moved to set aside the certificate on two grounds: 1st, That this case was not within the 3 & 4 *Vict.* 3. *c.* 24. *s.* 2.; 2dly, That the certificate was insufficient.

Pending this rule, an application was made to the Lord Chief Justice to amend the certificate, whereupon his lordship signed the following indorsement: — "I certify that this action was really brought to try a right, besides the mere right to recover damages for the grievances alleged in the declaration and for which this action was brought; and that the right came in question upon the trial of this cause." (*b*)

Wilde Solicitor-General now shewed cause. With respect to the first ground upon which this rule was moved for, namely, that the case is not within the statute, it is sufficient to look at the state of the record. The declaration was for an injury done to the plaintiff's house and garden, by the mode in which the defendant carried on his manufactory in premises adjoining. Under the plea of not guilty, only two questions could arise, 1st, whether the defendant did the acts complained of? 2dly, whether those acts were wrongful?

The form of action is that commonly adopted where the object of the plaintiff is, to establish his right, and not merely to recover compensation for the injury done

(*a*) See the section, *post*, 834.

(*b*) The two certificates were quite distinct.

The case of *Ford* v. *Parr* (*a*) is expressly, and that of *Waggett* v. *Shaw* (*b*) is impliedly, overruled by the later decisions.

Adams Serjt., in support of the rule. First, this was not a case in which the judge had power to grant a certificate. No question of right arose or could arise upon this record. No right was put in issue by the plea of not guilty. If the defendant had pleaded leave and licence, or that he had carried on his trade for twenty years without interruption, then it might have been said that a right came in question between the parties. [*Maule* J. The certificate relates to the object for which "the action was really *brought*." That is a matter which cannot be affected by the course of pleading that may afterwards be adopted.] The action was for a nuisance; all that the defendant alleged was, that he had committed no nuisance. The whole of the cross-examination of the plaintiff's witnesses, and the address of the defendant's counsel, shewed that the defendant set up no claim of right, but merely insisted that the trade, as carried on, did not amount to a nuisance. [*Maule* J. The real question between the parties was, to try whether you had a right to carry on your trade as you did. If it was impossible, looking at the declaration, that the action could have been brought to try anything but the question of damages, then the judge had no power to certify.] Supposing this to be a case in which the judge had authority to grant a certificate, it was not one in which the power should have been exercised. [*Tindal* C. J. You have a right to say that, on the record, the right could not come in question, and argue that as a legal question, but not that if I had the power, I did wrong to grant the certificate.] If any certificate had been given at all, it should have been that "the

(*a*) 2 *Wils.* 21. (*b*) 3 *Campb.* 316.

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or that the trespass or grievance in respect of which the action was brought was wilful and malicious." I take the object of the act to be to prevent plaintiff from bringing actions of a vexatious and litigious nature where very little damage has been sustained, and there is no right in issue. What is the nature of the present action? It is an action on the case for a nuisance; and the plaintiff in his declaration states that he is possessed of a messuage and of gardens, and that the defendant is possessed of a mill and manufactory near to the plaintiff's premises, in which the defendant used certain engines, &c. so as greatly to incommode the plaintiff in the enjoyment of his property. That is the ground of complaint. The defendant, by his plea, denies that to have taken place which is stated in the declaration. Who can say that there is no question of right between the parties? The plaintiff on the one hand asserts his right to occupy his house free from the nuisance caused by the defendant, and the latter, on the other hand, declares that the acts complained of are not a nuisance. It appears, therefore, from the declaration, that the plaintiff did not bring his action for damages, but to try a right; and when the witnesses were called at the trial, they were cross-examined on the part of the defendant, not to shew merely that the plaintiff had sustained little damage, but to the point that the defendant had carried on his manufactory with such trifling injury to the plaintiff that it did not amount to a nuisance. I think, therefore, that this action falls clearly within the words of the act, being "really brought to try a right, besides the mere right to recover damages for the trespass or grievance." It is to be observed that two different certificates may be granted under the act, the one where the right comes in question, and the other where the trespass or grievance is wilful and malicious. The object of the act is, to prevent plaintiffs bringing actions

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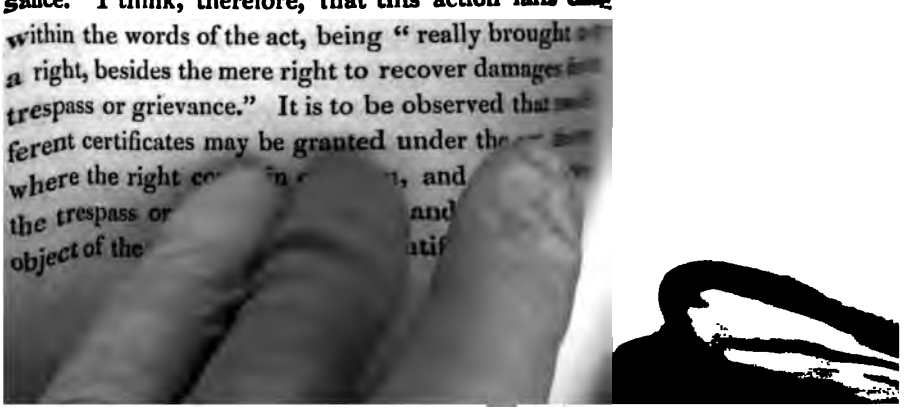
or that the trespass or grievance in respect of which the action was brought was wilful and malicious." I take the object of the act to be to prevent plaintiff from bringing actions of a vexatious and litigious nature where very little damage has been sustained, and there is no right in issue. What is the nature of the present action? It is an action on the case for a nuisance; and the plaintiff in his declaration states that he is possessed of a messuage and of gardens, and that the defendant is possessed of a mill and manufactory near to the plaintiff's premises, in which the defendant used certain engines, &c. so as greatly to incommode the plaintiff in the enjoyment of his property. That is the ground of complaint. The defendant, by his plea, denies that to have taken place which is stated in the declaration. Who can say that there is no question of right between the parties? The plaintiff on the one hand asserts his right to occupy his house free from the nuisance caused by the defendant, and the latter, on the other hand, declares that the acts complained of are not a nuisance. It appears, therefore, from the declaration, that the plaintiff did not bring his action for damages, but to try a right; and when the witnesses were called at the trial, they were cross-examined on the part of the defendant, not to shew merely that the plaintiff had sustained little damage, but to the point that the defendant had carried on his manufactory with such trifling injury to the plaintiff that it did not amount to a nuisance. I think, therefore, that this action falls clearly within the words of the act, being "really brought to try a right, besides the mere right to recover damages for trespass or grievance." It is to be observed that different certificates may be granted under the act where the right comes in question, and the trespass or grievance and object of the action



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or that the trespass or grievance in respect of which the action was brought was wilful and malicious." I take the object of the act to be to prevent plaintiff from bringing actions of a vexatious and litigious nature where very little damage has been sustained, and there is no right in issue. What is the nature of the present action? It is an action on the case for a nuisance; and the plaintiff in his declaration states that he is possessed of a messuage and of gardens, and that the defendant is possessed of a mill and manufactory near to the plaintiff's premises, in which the defendant used certain engines, &c. so as greatly to incommode the plaintiff in the enjoyment of his property. That is the ground of complaint. The defendant, by his plea, denies that to have taken place which is stated in the declaration. Who can say that there is no question of right between the parties? The plaintiff on the one hand asserts his right to occupy his house free from the nuisance caused by the defendant, and the latter, on the other hand, declares that the acts complained of are not a nuisance. It appears, therefore, from the declaration, that the plaintiff did not bring his action for damages, but to try a right; and when the witnesses were called at the trial, they were cross-examined on the part of the defendant, not to shew merely that the plaintiff had sustained little damage, but to the point that the defendant had carried on his manufactory with such trifling injury to the plaintiff that it did not amount to a nuisance. I think, therefore, that this action falls clearly within the words of the act, being "really brought to try a right, besides the mere right to recover damages for the trespass or grievance." It is to be observed that two different certificates may be granted under the act, the one where the right comes in question, and the other where the trespass or grievance is wilful and malicious. The object of the act is, to prevent plaintiffs bringing actions

made at the time. It is like the ordinary case of the associate entering the verdict on the wrong counts, and coming to the judge subsequently to amend the mistake. So in the case of fines, the omission of the officer to record the proclamations has frequently been supplied by the court. In all these cases it has been held that, within a reasonable time, the mistake of the officer may be corrected. I therefore think that the amendment of the certificate in this case was justifiable; and that the rule must be discharged.

BOSANQUET J. This was, I think, a case in which the judge had power to certify under 3 & 4 *Vict. c.* 24. It has been contended, that this was not a case in which the right *could* come in question. The action is for a nuisance, the existence of which the defendant, by his plea, denies. Such an action might be brought, not to try a right, but for the mere purpose of obtaining damages. Where, however, the record is so framed, that a right, beyond the mere right to recover damages, *may* come in question, this court cannot inquire whether or not the judge has exercised a sound discretion in granting a certificate. It is a matter entirely for the discretion of the judge, upon the effect of the evidence, and upon the course taken by the parties at the trial. I cannot but say, that I think the Lord Chief Justice exercised a sound judgment in granting this certificate.

Assuming, therefore, that his lordship was justified in considering this action as an action brought to try a right independent of damages, the question arises whether the certificate must be given immediately after the trial. I am strongly inclined to think that it ought to be granted as soon as the cause is tried, and that it should not be left for a future period; unless the application is made directly, and the judge, by consent, takes time for consideration. Here, it appears that an

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at the time, and having been drawn up erroneously by the officer, the judge clearly had power to correct it afterwards, and order it to be entered *nunc pro tunc.*

MAULE J. I also am of opinion that this rule should be discharged. I have no doubt that this was a case in which the judge might grant a certificate. It is clear that the action was brought to try something beyond the mere question of damages. It is said that the right could not come in question on this record; but even supposing that were so, yet the action may still have been *brought* to try a right, although the defendant afterwards did not think proper to contest such right. An action may be brought to try a right, where nothing appears on the record to indicate such an intention. An action of trover, or for money had and received, is often brought for the purpose of trying a right, without exhibiting any thing on the record to shew what the intention was in commencing the action, or whether or not the right came in question at the trial. The object of the statute manifestly is, to discourage frivolous suits. But an exception is made in favour of persons, who, although they claim only small damages, seek to negative the right of other parties to do the act of which they complain. There can be no doubt that this was a case in which the judge might certify; and if that be so, we have nothing to do with the evidence given at the trial; for the power to grant the certificate rests with the judge, and we have no authority to review his decision. The certificate granted by the Lord Chief Justice after the trial, though it did not follow the words of the act 3 & 4 *Vict. c.* 24. *s.* 2., was evidently intended as a certificate under that act; and it is sufficient to shew that his lordship's determination to give the plaintiff his costs, was come to at the trial. If defective in point of form, it was properly amended, by his lordship in analogy

Finch v. *Roe*, 5 *Dowl. P. C.* 225.; *Doe d. Agar* v. *Roe*, 6 *Dowl. P. C.* 624.; *Doe d. Emerson* v. *Roe*, *ib.* 736.; *Doe d. Timmins* v. *Roe*, *ib.* 765.; *Doe d. Thomas* v. *Roe*, 1 *Moo. & Scott.* 435.; *Doe d. James* v. *Roe*, *ib.* 597.; *Doe d. Brittlebank* v. *Roe*, *ib.* 502.; *Doe d. Watts* v. *Roe*, 1 *Har. & Woll.* 199.; *Doe d. Harris* v. *Roe*, *ib.* 372.; *Doe d. Read* v. *Roe*, 1 *Mees. & W.* 633., 5 *Dowl. P. C.* 85.; *Doe d. Lord Dinorben* v. *Roe*, 2 *M. & W.* 374. None of these cases, however, go to the extent of requiring that the fact should be *known* to the lessor of the plaintiff on the first day of term.

Clark *v.* Morrell.

Nov. 5.

Assumpsit. The first count of the declaration stated that the plaintiff, before and at the time of the making of the agreement and promise therein mentioned, was, and from thence had been, and still was, a professor of chemistry in the University of *Aberdeen*, and the pursuit and calling of a professor of chemistry in that University had, for and during all that time exercised and followed, and still did exercise and follow; that on the 10th day of *October* 1836, by a certain agreement then made between the plaintiff and the defendant, the plaintiff did, *amongst other things*, agree with the defendant, that he, the plaintiff, would take the management and direction of the manufacturing departments of the chemical works at the Imperial Salt and Alkali Company, when established, for the term of five years, to commence from the first day of the said month of *October*, for one month in each of the said five years, either together or for one week or more at any specific time of the year during the vacation of the said University; and if necessary, for one week at any other

Where in *assumpsit* the promise of the defendant is alleged to have been made in consideration of a certain service to be performed by the plaintiff, *amongst other things*, the omission to specify the other branches of the consideration included under the term "other things," is no ground of nonsuit, unless upon the production of the agreement, in which such other branches of the consideration are specified, they appear to contain matter in the nature of a condition precedent.

Held, that, supposing the omission to be material, it is a variance, and, as such, amendable within the statutes allowing amendments at *Nisi Prius*.

afterwards, to wit, on the day in the year last aforesaid, did make and accomplish one oil of vitriol chamber in the process of actual working; and although the plaintiff did, after the making of the said agreement, and during the year ending on the 1st day of *October*, A. D. 1837, take the management and direction of the manufacturing departments of the chemical works of the said company, and did give his personal attendance at the said chemical works of the said company for the period of one month, and although the attendance of the plaintiff was required by the said company in carrying on and continuing certain new chemical inventions, and although the plaintiff did attend at the said chemical works of the said company during the said year ending the 1st day of *October*, A. D. 1837, in compliance with the said requisition of the said company, for a long period, to wit, for the period of two months and seventeen working days, such period being thought necessary in that behalf, and being much longer than, and independent of, and in addition to, the aforesaid period of one month; yet the defendant did not, nor would perform the said agreement on his the defendant's part, nor his said promise, but wholly disregarded the same, and deceived the plaintiff in this, to wit, that the defendant did not nor would pay to the plaintiff the said sum of 400*l.*, or the said sum of 50*l.* for his personal attendance at the chemical works of the said company for the period of one month during the year ending on the 1st day of *October*, A. D. 1837, as aforesaid; nor did he nor would he pay the plaintiff for his additional attendance for the said period of two months and seventeen working days, independent of and in addition to the above-mentioned period of one month as aforesaid, after the rate of 2*l.* for each working day, for the plaintiff's said additional attendance for the aforesaid period of seventeen working days; which

compliance with the supposed requisition of the said company for the supposed period in the first count in that behalf mentioned, and therein supposed to have been thought necessary in that behalf, and being longer than, and being independent of and in addition to the said period of one month, the defendant says that the attendance of the plaintiff was not required by the company in carrying on and continuing any new chemical inventions, and that the plaintiff did not attend at the said chemical works of the company during the year in the said first count in that behalf mentioned, in compliance with any requisition of the company, for the period in the first count in that behalf mentioned or any part thereof, nor was such period or any part thereof thought necessary.

The plaintiff joined issue upon the first four pleas, and demurred specially to the fifth. The defendant joined in demurrer.

At the trial before Lord *Abinger* C. B., at the last assizes for the county of *Surrey*, the following agreement was produced by the plaintiff, in support of the first issue.

"Memorandum of a basis for a proposed agreement, to be made between Dr. *Thomas Clark*, Professor of Chemistry, *Aberdeen*, and *Robert Morrell* of the city of *Oxford*, Gentleman, on the part of the Imperial Salt and Alkali Company, at *Stoke Prior* or *Stokewich*, in the county of *Worcester*.

"First. Dr. *Clark*, for the considerations after mentioned on the part of the company, doth hereby agree with them to take the management and direction of the manufacturing departments of the chemical works of such company when established, for the term of five years, to commence from the first of this month, for one month in each of the five years, either together or for one week or more at any specific time of the year

ability, all questions and difficulties which he may be requested to do by such resident practical chemist, in carrying on the company's works.

Thirdly, In the case of Dr. *Clark*'s making and ascertaining any invention relating to the manufactures of the company for which they may think it right to obtain a patent or patents for the United Kingdom, he, Dr. *Clark*, doth hereby agree with the company, that he will assign to them such patent, so far as the same may extend for *Ireland*, *Wales*, and all of *England* south of fifty-three degrees of north latitude, and that he, Dr. *Clark*, during such term, shall not grant or make to any other person or persons any licence or other disposition of the said patent or patents, without the consent of the company; and the profits which may be derived from such licences or dispositions, to be granted or made to other persons during such term, for any part of the United Kingdom (deducting therefrom the law expenses which may be incurred by the company for defending or supporting the patent or patents, in case they shall think it right to support any actions on this account), shall be equally divided between the company and Dr. *Clark*.

On the part of the company, *Robert Morrell* doth hereby agree with Dr. *Clark* to pay him 400*l.* as soon as they have made one oil of vitriol chamber in the process of actual working; and after the accomplishing thereof, that the company shall pay to Dr. *Clark* 50*l.* a year, to commence from the first of the present month, for the above term of five years, on his perfecting his undertaking with regard to his employment, either by his personal attendance at the works for a month in each year, or his so applying himself in his chemical knowledge for six weeks, at *Aberdeen*, in trying experiments by way of improvement for the company's works in the manner above-mentioned; and that the

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it was objected that there was a variance between the agreement produced and the declaration, which was silent as to many of the stipulations, which constituted parts of the consideration for the defendant's promise. The learned judge was of opinion, that the objection was well founded. An application was then made on the part of the plaintiff to amend the declaration and record, by setting out the whole agreement. For the defendant, it was contended, that this was not a case in which the judge had power to amend either by 9 *G.* 4. *c.* 15. or by 3 & 4 *W.* 4. *c.* 42.; and that if the amendment was made, the trial should be postponed. The learned judge, however, allowed the amendment, and refused to put off the trial, giving the defendant leave to move to enter a nonsuit, if the court should be of opinion that the variance was material, and that the amendment should not have been made. A verdict having been found for the plaintiff, damages 454*l.* 19*s.*,

Ludlow Serjt. now moved accordingly. The declaration did not set out the whole of the consideration. The omission was clearly a material variance. The defendant contracted with the plaintiff, stipulating that the plaintiff should not communicate his discoveries to others, but should reserve the benefit of those discoveries for the company. That stipulation is not mentioned in the declaration. At the trial the defendant contended, first, that the learned judge had not the power to make the amendment prayed; and secondly, that if he had the power, this was not a case in which it could be properly exercised. It may be admitted that these statutes are to be expounded liberally. *Masterman* v. *Hudson.* (*a*) But this is not a case of a misstatement, but of an omission. [*Tindal* C. J. Did the amendment introduce any condition which would

(*a*) 8 *Bingh.* 230.; 1 *Moo.* & *Scott,* 307.

fendant's promise is the agreement, to which reference is made. The plaintiff does not profess to set out the whole of the agreement. There is no variance, unless there is an omission of something of a conditional nature, which, if stated, would require an allegation of performance. The omission of those parts of the agreement by which the plaintiff undertook not to communicate his discoveries to strangers, and to give to the company the exclusive benefit of his knowledge, as far as their works were concerned, would not go to the root of the agreement, but would only constitute the subject of a cross action. (*a*)

The learned judge, however, thought either that there was a variance, or that it would be safer to amend; and the second point for our consideration is, whether the learned judge had authority to make the amendment. The power of amendment given by 9 *G.* 4. *c.* 15. has been so much enlarged by 3 & 4 *W.* 4. *c.* 42., that it will be sufficient to look only at the latter statute, by the twenty-third section of which, I think the Lord Chief Baron was justified in allowing the amendment. That amendment does not introduce any matter calculated to prejudice the defendant in his defence. It is impossible to suppose that the defendant was not acquainted with those parts of the agreement which it was the object of the amendment to introduce into the declaration, he being a party to that agreement. (*b*)

BOSANQUET J. The declaration states that the plaintiff did, amongst other things, agree to take the management of the company's works. I cannot think that the omission to specify those other things is a variance between the allegations, on the record, and the agreement

(*a*) See *Boone* v. *Eyre*, 2 *W. Bla.* 1312.; 1 *H. Bla.* 273 *n.*; *Duke of St. Alban's* v. *Shore*. *Ib.* 270.; *Fothergill* v. *Walton*, 2 *B. Moore*, 630.; *Hallewell* v. *Morrell*, *antè*, 367.; 1 *Scott*, *N. R.* 309.; *Rose* v. *Poulton*, 2 *B.* & *Adol.* 822.; 1 *Wms. Saund.* 320. (4).

(*b*) *Vide antè*, 582.

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Nov. 21.

Case for negligence, for exposing ploughshares for sale in a street, whereby the plaintiff was thrown down and injured. Plea: not guilty. At the trial the jury found their verdict for the plaintiff, damages 1*s.*, and the judge refused to certify, on the ground that it was not a case in which he had power to do so, under the 3 & 4 *Vict. c.* 24. *s.* 2.

Held, that although the action was not one in which the judge could grant a certificate, it was still within the statute, and that the plaintiff was not entitled to his costs.

CASE, for negligence. The declaration charged that the defendant had wrongfully exposed to sale in a street in the city of *Peterborough*, ploughs and other implements; and that the plaintiff, being in the said street with a horse and cart, while endeavouring to restrain the horse from running away, was by reason of the said implements, thrown down and injured. (*a*)

Plea: not guilty.

The cause was first tried before *Bosanquet* J., at the Spring assizes for *Northamptonshire* in 1840, when a verdict was found for the defendant. A new trial having been granted (*b*), the cause was again tried before *Littledale* J., at the ensuing Summer assizes, when the jury found their verdict for the plaintiff, damages 1*s.* An application was immediately made to the judge for a certificate, under the 3 & 4 *Vict. c.* 24. *s.* 2. (*c*); which, after consulting the Lord Chief Justice, he refused to grant, being of opinion that the case was not one in which he had power to certify.

Goulburn Serjt. now moved for a rule to shew cause why the master should not be directed to tax the costs of the plaintiff, notwithstanding there was no certificate. The statute of the 3 & 4 *Vict. c.* 24. *s.* 2. does not apply to actions for negligence. Although the words "any action of trespass, or of trespass on the case" are general, they must be construed to extend only to cases

(*a*) See the declaration at length, *antè*, p. 568.

(*b*) *Antè*, p. 568.; 1 *Scott, N. R.* 302.

(*c*) See the clause, *antè*, p. 834.

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Suppose, instead of the plaintiff being hurt himself, his shoe merely had been injured, would he have been entitled to recover his costs? You must go to the length of contending, that although the injury be of the most trifling description, the plaintiff may still recover his costs.] By analogy to the construction put upon the statute of the 22 & 23 *Car.* 2., it is submitted that the recent act applies only to cases in which the judge has power to certify, and that, where the case is not of that description, the plaintiff is entitled to his costs under the statute of *Gloucester*.

TINDAL C. J. We must take it for granted in this case, that the jury gave the just measure of damages. The statute expressly provides, that if the plaintiff, "in any action of trespass or of trespass on the case," shall recover less damages than 40*s.*, he shall not be entitled to costs, unless the judge shall certify that the action was really brought to try a right, besides the mere right to damages, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious. Here, the judge has not granted a certificate; and it therefore follows, the case being within the act, that the plaintiff is deprived of his costs.

BOSANQUET J. It is contended on the part of the plaintiff, that this case does not fall within the recent act, but that the plaintiff is entitled to his costs under the statute of *Gloucester*. It seems to me that the latter statute is virtually repealed (*a*), by the late act which expressly deprives plaintiffs, in any action of trespass, or of trespass on the case, of their costs where they recover less than 40*s.* damages, unless the judge shall certify. Here, the judge has not certified. I am by no means prepared to say that an action of this nature *may*

(*a*) *i. e.* as to actions of trespass and on the case for torts.

the statute; and if we were to hold otherwise, the plaintiff would in every case of negligence, however trifling, be entitled to costs; which would give rise to the very mischief which was intended to be obviated by the act.

Rule refused.

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had sustained damage by the wrongful act of the defendant (without which the verdict should have been for the defendant), he would be entitled to compensation to the precise extent of the injury sustained, whether the defendant was little or much to blame. *Vide antè*, 224 (*b*).

The rule could only have been obtained *upon payment of costs* of the *second* action, as to which, see *antè*, 570. 572 n.

GWYNNE *v.* DAVY and Another.

Nov. 11.

ASSUMPSIT. The declaration stated, that theretofore and before the commencement of the suit, and before the making of the agreement thereinafter mentioned, to wit, on the 18th of *April* 1838, by a certain indenture then made between the defendants, (therein described as wholesale and manufacturing chemists and druggists and co-partners, trading under the firm of *Davy, Mackmurdo*, and Co.) of the first part, and

By a deed of the 18th of *April* 1838, the defendants contracted to employ the plaintiff in the management of certain chemical works, for the term of seven years, from the 30th of *June* then next, with a proviso that if a process for making a certain quantity of sulphate of quinine, on which the plaintiff was then engaged, should not be in operation upon the 21st of *June*, then the defendants should, on, or at any time after, that day, have power to determine the contract by notice in writing.

On the 9th of *August* 1838, a second agreement in writing, but not under seal, was entered into between the parties, which, after stating that the plaintiff had not succeeded in producing the sulphate of quinine as stipulated in the deed, extended the period for its production until the 21st of *December* 1838.

The plaintiff having brought assumpsit upon the second agreement, for a breach of stipulations contained in the deed: Held, that the action could not be maintained, the second agreement being merely an agreement for the extension of the time mentioned in the deed, and not an agreement incorporating the terms of that deed, which was still in force.

witnessed that, in pursuance and performance of the said agreement, the defendants did thereby for themselves, &c., covenant with the plaintiff, and the plaintiff did thereby for himself, &c., covenant with the defendants, among other things, that the plaintiff should have the management, &c., of the said manufactory, from the date of the said indenture until the expiration of seven years, to be computed from the 30th of *June* then next, and that the plaintiff should not, during the continuance of the said contract, be engaged or assist in any similar manufactory, without the consent in writing of the defendants; that the plaintiff should be allowed and have all such facilities, materials, ways, and means whatsoever for carrying on and prosecuting the said experiments in the manufacture of sulphate of quinine at the said factory, as he had theretofore had and used, and that he should, to the best of his skill and ability, without delay, proceed with and continue the said experiments, and complete and perfect the same; that the defendants should provide from time to time, during the said term of seven years, all such articles, things, capital, and sums of money as should be required for the manufacture of such articles as the defendants and the plaintiff should agree to manufacture, and for the payment of all wages, charges, and other outgoings, in, about, or relating to the said manufactory; that the plaintiff should not act as partner with the defendants, or with either of them, or represent himself, or suffer himself to be represented as such, or use the partnership name, or attempt to bind the said copartnership, or either of the defendants, in any manner whatever; that if the process for the making sulphate of quinine should not be completed by, and in regular operation upon, the 21st of *June* then next ensuing, and producing, on an average, at the least, forty-five ounces of good merchantable sulphate of quinine, from 100 lbs. of yellow bark, of a quality as good as that then or lately at the

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ants) and *George Gwynne*, on the 18th of *April* 1838, and *Davy* and *Mackmurdo* are desirous, and have proposed, that an experiment in the course of a few days should be made and minutely recorded by *Charles Davy*, on 200 pounds of bark, in order to satisfy themselves what produce can be obtained, and as *George Gwynne*'s assistance and instructions are essential for the completion of the above experiment, and he is quite disposed to afford *Charles Davy* every facility in his power, provided he is protected against future injury; it is hereby agreed, that the period for the production of the forty-five ounces of sulphate of quinine from 100 pounds of bark, as stipulated in the deed executed by *Charles Davy* and *Edward L. Mackmurdo* and *George Gwynne*, on the 18th of *April* 1838, shall be extended to the 21st of *December* 1838." — Mutual promises. — Averment, that from the making of the last-mentioned agreement until a certain day, to wit, the 12th of *October* then next ensuing, when the defendants wrongfully broke the last-mentioned agreement as thereinafter mentioned, the plaintiff well and truly performed the last-mentioned agreement in all things therein contained on the plaintiff's part to be performed, and was ready and willing to perform the last-mentioned agreement in all things in the said agreement contained to be by him performed, until the end and expiration of the term limited and mentioned in the last-mentioned agreement; and that although the plaintiff entered upon and undertook the management, &c., of the said manufactory from the day in that behalf mentioned in the last-mentioned agreement, and continued in such management, &c., until the breach by the defendants of the last-mentioned agreement and promise as thereinafter mentioned, and was ready and willing to continue such management, &c., during the continuance and until the expiration of the said term of seven years in that behalf in the last-mentioned agreement named

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wit, four days after the making of the last-mentioned agreement, enter upon the making of the said experiment upon 200 lbs. of bark, as in the same agreement mentioned, and was engaged in making such experiment thence until the day when the last-mentioned agreement was broken by the defendants as thereinafter mentioned, and did, during all that time, afford to the defendants, and particularly to the said *Charles Davy*, all the assistance and instruction and every facility in the plaintiff's power, for the completion of the last-mentioned experiment, and would have continued so to do; and although the plaintiff, until and at the time of the breach of the last-mentioned agreement by the defendants as thereinafter mentioned, was ready and willing, and then offered the defendants to continue in the prosecution of such last-mentioned experiment, and to allow, suffer, and permit the same to be minutely recorded by the defendant *Charles Davy*, and to enable him to do so, and continue to afford all the assistance and instructions and every facility in the plaintiff's power to the defendants, and especially to the said *Charles Davy*, and to continue to perform all other things on the plaintiffs' part in the last-mentioned contract to be performed and fulfilled, until the completion and due determination of the last-mentioned agreement as in the said last-mentioned agreement was in that behalf mentioned; of all which the defendants had notice; yet the defendants, not regarding their said promise and undertaking in that behalf as aforesaid made, did not, nor would, perform, fulfil, and keep all things in the last-mentioned agreement contained on their part and behalf to be performed, &c., but broke their last-mentioned agreement in this, to wit, that they did, nor would, nor did, nor would either of them allow the plaintiff to have all such facilities, materials, ways, and means for carrying on and prosecuting the said experiments, and the manufacturing of sulphate of quinine at the said factory as he

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upon the agreement therein mentioned; that the first breach does not state or shew that the bark, so alleged to have been removed, was, at the time of such removal, necessary or required for carrying on and prosecuting the said experiments, or any of them, or that the plaintiff had not, at the time of the removal, a sufficient quantity of bark for the purpose of the said experiments, independently of the quantity so removed, or that there was, at any time, any refusal by the defendants to supply and provide bark to the plaintiff for the purpose of the said experiments; that the said breach did not shew what facilities, materials, ways, or means the plaintiff had or used before the making of the said agreement, which the defendants refused to allow to the plaintiff after the making thereof, &c. Joinder in demurrer.

Peacock, in support of the demurrer. This declaration is demurrable on two grounds; first, the action is misconceived, the plaintiff having brought assumpsit on the agreement, instead of covenant on the original deed; and, secondly, the breach is insufficient, and complains of the defendants' not doing that which they were not bound to do. With respect to the proper form of action, it appears that, by the deed of the 18th of *April* 1838, the defendants contracted to employ the plaintiff in conducting certain chemical works for the term of seven years from the 30th of *June* then next, with a proviso, that if the process for making sulphate of quinine should not be in regular operation upon the 21st of *June* 1838, the defendants should, on or after that day, be at liberty to determine the contract by notice in writing. It is stated on the record, that the plaintiff had not completed his experiments against the day named; consequently the defendants might have put an end to the contract. They, however, did not avail themselves of the power given them by the proviso; but, on the 9th of *August*, entered into a parol agreement

be by deed or not, it is necessary to declare upon the deed if there be one. The strong impression upon my mind is, that upon principle, although there be a deed between the parties, yet if there be a debt independent of the deed, the amount of which however is to be ascertained by the deed, the existence of the deed will not prevent the party from recovering the debt upon the common counts." So here the deed is extrinsic and collateral, and its existence is alleged merely as inducement, to explain the subsequent parol agreement. The fallacy on the other side consists in assuming that the plaintiff is attempting, by the parol agreement, to control or vary the terms of the original deed.

The plaintiff could not have sued on the deed, for he must then have averred performance of the experiments within the specified time, the stipulation amounting to a condition precedent, and this he would have been unable to do. In *Littler* v. *Holland* (*a*), where the plaintiff covenanted to build two houses for 500*l.* by a certain day, and averred, in an action of covenant for the money, that the houses were built within the specified time, it was held, that evidence that the time had been enlarged by parol agreement, and that the houses were finished within such extended period, did not support the declaration. *Brown* v. *Goodman* (*b*), and *Heard* v. *Wadham* (*c*) are to the same effect. In *Thompson* v. *Brown* (*d*), *Gibbs* C. J. says, "It is most expressly laid down, that, in covenant on a charter-party, the plaintiff must shew that he has done all which lay on him, of that which the covenant required him to do; and he cannot aver that, by parol, something else is substituted for it." In *Greig* v. *Talbot* (*e*), in debt on a bond conditioned for the performance of an award to be made within a limited time, the declaration, after

(*a*) 3 *T. R.* 590.
(*b*) 3 *T. R.* 592 *n.*
(*c*) 1 *East*, 619.
(*d*) 7 *Taunt.* 656. 674.; 1 *B. Moore*, 358.
(*e*) 2 *B. & C.* 179.; 3 *D. & R.* 446.

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ment between the parties. The question is, whether this is a new agreement, or an abortive attempt to control the original deed. [*Tindal* C. J. The parol agreement is simply to extend the time of giving notice.] If an action were to be brought against the plaintiff for non-performance of the terms of the original deed, the cases shew that he could avail himself of the parol agreement. There is also a marked distinction between a subsequent agreement being entered into before and after the breach of the first agreement, for in the latter case the subsequent agreement has much greater force; *Thompson* v. *Brown* (*a*); *Heard* v. *Wadham* (*a*); *Rippinghall* v. *Lloyd.* (*b*)

TINDAL C. J. This case appears to me to be free from doubt. The action is brought upon an agreement, not under seal, made on the 9th of *August* 1838, and breaches are assigned as if upon that agreement. The objection taken to the declaration is, that it appears, upon the face of it, that there is an agreement under seal between the same parties, which is still in force, and the question is whether, looking at the declaration, such is the fair deduction to be drawn from it.

Now it appears that on the 18th of *April* 1838, by a deed then made between the plaintiff and the defendants, it was agreed that the plaintiff should be employed in certain chemical works belonging to the defendants, for the period of seven years from the 30th of *June* then next, and that the deed contains a stipulation that if the process for making sulphate of quinine should not be in regular operation on the 21st of *June* then next ensuing, and producing the amount of quinine therein specified, then the defendants should, on and at any time after that day, have power to determine, not that the deed should be void, but to determine the contract

(*a*) *Supra*, 867.

(*b*) 5 *B.* & *Ad.* 742.; 2 *N.* & *M.* 410.

According to my understanding of this agreement, it is simply an extension of the time for the production of the stipulated quantity of the sulphate of quinine, leaving the deed itself in full force. I cannot distinguish this case from those in which it has been laid down, that where an act is required by deed to be done against a certain time, you cannot shew that the period has been extended, except by some instrument also under seal. It is said that this will leave the plaintiff without any remedy, as he cannot recover upon the original deed without averring that the process for making and producing the stipulated quantity of sulphate of quinine had been completed within the time mentioned in the deed. That, however, is assuming the stipulation to be a condition precedent, which is far from being clear. But if that be so, he must have recourse to a court of Equity; our judgment must be for the defendants.

BOSANQUET J. This action is brought upon a parol agreement, and the declaration sets out a previous agreement under seal between the same parties. The breach assigned is a breach of the parol agreement, but of matter which is not contained in terms in that agreement; the breach being framed upon the stipulations contained in the deed. The only question is, whether the true construction of the parol agreement is, that it is a mere enlargement of the time for the performance of the experiments mentioned in the deed; or it is a new agreement incorporating all the terms of the deed, and, consequently, that the plaintiff, for a breach of its stipulations, may bring an action of assumpsit. It appears to me to be nothing more than an agreement on the part of the defendants, that they will not exercise the option given to them by the deed, of determining the contract until a certain day. If the defendants violate that agreement, they may possibly be liable to be sued upon it, but it is not necessary to enter into that

mitted a breach of their second agreement. But the plaintiff has thought proper to bring assumpsit on the original deed, which, it is clear, he cannot do; and, consequently, our judgment must be for the defendants.

Judgment for the defendants.

ARCHER *v.* ENGLISH and WALKER.

Nov. 17.

ASSUMPSIT, for work and labour by the plaintiff, as an attorney, for money paid, &c., and upon an account stated.

Plea: payment of 30*l.* into court, and that the plaintiff has not sustained damages beyond that sum. (*b*)

Replication: damages sustained beyond that sum (*c*). Whereupon issue was joined.

At the trial before *Coltman* J. at the *Middlesex* sittings after *Hilary* term, 1839, it appeared that one

A plea of payment of money into court to a count in indebitatus assumpsit (*a*) admits the existence of some contract or contracts falling within the description of the debt stated as the consideration of the promise laid in such count; but it does not amount to an admission of any particular contract, even of the contract in respect of which the money is in fact paid in.

Where, therefore, in an action against two, money is paid into court by both defendants with a plea of payment into court under *R. T.* 1 *Vict.*, the plaintiff, in order to recover damages beyond the sum paid in, must shew, not only that his demand, in respect of which the money is in fact paid into court, exceeds the amount paid in, but that the defendants are joint contractors.

(*a*) So in debt on simple contract, if the count be drawn in the loose indebitatus form now usually adopted, which is taken from the counts in assumpsit. But where the declaration states the contract specially, in the old form, as that the plaintiff sold and delivered to the defendant twenty sheep, at the price of 33*s.* each, the admission in the plea of payment into court would extend to the particular bargain disclosed in the declaration, inasmuch as upon the old plea of nil debet, the plaintiff must have proved the contract as laid.

(*b*) Under rule *H.* 4 *W.* 4. reg. 17., amended by rule *T.* 1 *Vict.*; 4 *New Cases*, 814.

(*c*) Under Rule *H.* 4 *W.* 4. reg. 19., amended by rule *T.* 1 *Vict.*; 4 *New Cases*, 815.

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for him for 4*l.* 2*s.* 10*d.* beyond the money paid into court. The learned judge having reserved leave to the defendants to move to enter a nonsuit,

Wilde Serjt. in *Easter* term 1839, obtained a rule *nisi* accordingly, against which

Jervis and *Marshman* now shewed cause. It was held in *Ravenscroft* v. *Wise* (*a*), where there was, in point of fact, only one contract, that the payment of money into court by the four defendants admitted such contract, and that they were precluded from setting up as a defence, that one of them was not a party to it. That case was precisely similar to the present; for here the defendants admit that they are liable on some contract, and only one contract was shewn. It has been said that *Ravenscroft* v. *Wise* is overruled by *Kingham* v. *Robins* (*b*) and *Stapleton* v. *Nowell* (*c*); but those cases are distinguishable in many respects from that decision. Neither are *Blackburn* v. *Scholes* (*d*), or *Seaton* v. *Benedict* (*e*), strictly applicable to the present case. It is submitted, that, in principle, there can be no difference between a case where money is paid into court upon a declaration setting forth a special contract, and one where, although the form of the declaration is general, it is shewn by the evidence, that only one contract exists between the parties.

TINDAL C. J. It seems to me that we must be governed by the law as laid down in *Seaton* v. *Benedict*; for, although doubted by the court of Exchequer in *Ravenscroft* v. *Wise*, that court returned to the doctrine

(*a*) 4 *Tyrwh.* 741. 1 *C. M. & R.* 203.
(*b*) 5 *M. & W.* 94. 7 *Dowl. P. C.* 352.
(*c*) 6 *M & W.* 9. 8 *Dowl. P. C.* 196.
(*d*) 2 *Campb.* 341
(*e*) 5 *Bingh.* 28.

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ct or another; and that admission does not render able on any particular contract. (*a*)

ULE J. I also am of opinion that this rule should de absolute. The payment of money into court (*b*) ; the plaintiff's right of action upon the count in it is paid in. Where there is a special contract, yment admits that contract; but where the declar- consists of the general indebitatus count, the pay- dmits no more than is stated in that count. Here, eclaration alleges that the defendants are indebted

See *Blackburn* v. *Scholes*, b. 341.; and see *Godsall* ero, 9 *East*, 72. 79.

Before the rules of *H. T.* . the practice was to pay into court and to plead neral issue to the whole tion, whether a contract t out, or the plaintiff de- on the indebitatus counts Though in both cases ney paid in was, if ac- by the plaintiff, consi- as struck out of the de- n, the payment operated dmission of the contract former case, though not latter.

e the new rules, the plea ment into court is a spe- lea in confession and nce, in bar of the further nance of the action. a special plea, whether nent of money into court, ny other matter in con- and avoidance, is pleaded, aintiff and the defendant eed upon the facts stated declaration, and all the ions contained therein are considered as admitted to ecise extent to which, if ed, the plaintiff would een bound to prove them.

Where money was paid into court with a plea of the general issue upon a *special* contract, the rule to pay money into court admitted the existence of a contract which *remained* upon the record, as well as the truth of the breaches assigned, leaving the amount of damages only open. Where the payment was upon *indebitatus* counts, it admitted the existence of a contract or contracts which *ceased* to form part of the record. In *Ravenscroft* v. *Wise* the money paid into court was struck out of the declaration, agreeably to the old practice; and the decision in that case therefore appears to have been properly overruled. In the overruling cases, *Kingham* v. *Robins* and *Stapleton* v. *Nowell*, however, the payment of money into court was *pleaded*. In those cases it would seem to have been a legitimate subject of inquiry whether the contracts to which the admission on the record applied, were not the same as those shewn to be the only contracts existing between the parties. The law, however, must now be considered as settled otherwise.

HEMING, Demandant; GRIFFITHES, Tenant.

BEST and Wife, Vouchees.

A COMMON recovery was suffered on the 24th of *March* 1828, in the court of great session for the county of *Montgomery*, of two messuages, 100 acres of land, &c. in the parish of *Llandrinio*, in that county; which recovery

Lands of which a recovery was intended to be suffered, lay in the several parishes of *A.* and *B.* in the county of *M.* The parish of *A.* only was mentioned in the record of the recovery; but in the deed to make a tenant to the præcipe and to lead the uses of the recovery, "all the lands of the recoveree in the parish of *A.* in the county of *M.*, and all other her lands in the said county," were conveyed.

The court refused to amend the recovery, on the ground that the omission of the parish of *B.* was cured by the 8th section of the act for abolishing fines and recoveries (3 & 4 *W.* 4. *c.* 74.)

Storks Serjt. now moved to amend, upon an affidavit stating that the deed to make a tenant to the præcipe, and to lead the uses of the recovery, conveyed certain messuages and closes (naming them) of the vouchee, *M. A. Best* (then *M. A. Hollings*), in the parish of *Llandrinio*, in the county of *M.*, certain other closes (naming them, and stating their contents without any local description), and all other her lands in the said county; and that the lands which had always been held together, and were intended to pass, were partly in the parish of *Llandrinio* and partly in the parish of *Guilsfield*, in that county; and that lands described in the deed as situate in *Llandrinio*, were really in the parish of *Guilsfield*. The amendment prayed was the insertion of the words "in the several parishes of *Llandrinio* and *Guilsfield*," instead of the words "in the parish of *Llandrinio*." [*Tindal* C. J. The eighth section of the act for abolishing fines and recoveries says, "that if it shall be apparent, from the deed making the tenant to the writ of entry, or other writ, for suffering a common recovery, already suffered or hereafter to be suffered,

Justice to be, the power of amendment may not, since *expressio unius est exclusio alterius*, be considered as impliedly taken away by the ninth section, which provides "that nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, *in cases* not *provided for in this act.*" But for the doubt created by this uncalled for attempt to remove doubts, there would appear to be no objection to allow a record of the court to be made to agree with the truth of the fact, at the costs of parties or privies who thought it worth their while to incur the expense.

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HEMING, demandant; GRIFFITHES, tenant. BEST and Wife, vouchees.

In re MARY WILLIAMS.

Nov. 11.

MEREWETHER Serjt. moved for an order of the court, under the 3 & 4 *W.* 4. *c.* 74. *s.* 91., to enable *Mary Williams*, a married woman, to convey her interest in certain property to which she was entitled, without the concurrence of her husband. (*a*)

In order to ground an application, under the 3 & 4 *W.* 4. *c.* 74. *s.* 91., to enable a married woman to make a conveyance of her property, there must be an affidavit from her shewing her concurrence; and, if the husband does not join in the application, his non-concurrence must be accounted for by affidavit.

The application was grounded upon an affidavit, made by a sister of *Mary Williams*, which stated that the husband of the latter left his home in 1825, and had not since returned; that he had not written to, or otherwise communicated with, his wife or family, for the last three years and nine months; that, if alive, his residence was unknown to them, and that they were ignorant whether he was alive or dead. (*b*) To account for there not being an affidavit by *Mary Williams*, the sister's affidavit proceeded to state, "that the said *Mary Williams*, since the absence of her husband, and in consequence thereof, had become unable to provide for herself, and was much afflicted in her speech, though her intellect remained unimpaired."

(*a*) The rights of the husband are saved by the act.

(*b*) See *Ex parte Mary Gill*, 1 *New Cases*, 168., 4 *Mo. & Scott*, 431. *Ex parte Shuttleworth*, 4 *Mo. & Scott*, 332 n.

pending in the same court at the instance of the now plaintiffs, against the defendant, whereby the Lords of Council and Session aforesaid did then decree and ordain the defendant to make payment to the plaintiffs of 36*l.* 7*s.* 4*d.*, with the legal interest thereof from the 30th of *August* 1838 until payment; and also of a certain other sum of 4*l.* 4*s.* 5*d.* and 13*l.* 2*s.* 11*d.* for expenses of process, and 2*l.* 3*s.* 7½*d.*, the dues of extracting that decree; as by the said decree, remaining in the court of session at *Edinburgh* aforesaid, more fully appeared; and that such decree remained in full force and wholly unsatisfied; whereby the defendant became liable to pay to the plaintiffs the said sums of money, so decreed to be paid as aforesaid, together with such interest as aforesaid on the said sum of 36*l.* 7*s.* 4*d.*, according to the said decree, when he, the defendant, should be thereunto afterwards requested; and that being so liable, the defendant, in consideration thereof, afterwards, to wit, on the said 11th of *December* 1838 aforesaid, promised the plaintiffs to pay them the said sums of money, so decreed to be paid as aforesaid, together with such interest as aforesaid, on request. The declaration also contained a count upon an account stated.

Pleas,—first, non assumpsit; secondly, the statute of limitations; thirdly, that the said decree was not made and pronounced in and by the said court of Session in and concerning the said action, in manner and form as the said plaintiffs had above in the first count on that behalf alleged,—concluding to the country; fourthly, to the first count, that he, the defendant, was not, at the time of the commencement of the said action in the first count of the declaration mentioned, or at any time during the proceedings in the said court of Session in that count also mentioned, in that part of the United Kingdom of *Great Britain* and *Ireland* called *Scotland*, or at any place within the jurisdiction of the said court

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was resident in *Scotland* aforesaid, to wit, at *Edinburgh* there, but the defendant, before and at the times of the issuing of the letters of arrestment, and of the issuing of the summons and of the making of the citation thereinafter mentioned, and from those times continually hitherto, was absent and forth from *Scotland* aforesaid; that the defendant, then being so absent and forth from *Scotland* aforesaid, and certain persons, that is to say, Mrs. *L. Warham*, otherwise *Braidwood*, and *John A. Campbell*, then being indebted to the defendant in a large sum, to wit, 100*l.* each, they, the plaintiffs, after the 11th *November* 1825, to wit, on the 28th *August* 1838, for the purpose of giving to the court of Session jurisdiction in the action in the declaration mentioned, caused to be issued against the defendant letters of arrestment *ad fundandum jurisdictionem*, and then by virtue of the said letters, caused arrestments to be used in the hands of the said Mrs. *L. Warham*, otherwise *Braidwood*, and *John A. Campbell*, as then being debtors of the defendant *ad fundandum jurisdictionem*, to the said court of Session; that afterwards, and after the said 11th *November* 1825, to wit, on the 30th *August* 1838, the plaintiffs issued out of the said court of Session, in the said action in the declaration mentioned, a certain summons under the signet of our Lady the Queen, in the words and figures following; that is to say, and [The replication then set out the summons at length, which purported to have been issued at the suit of the plaintiffs, as surviving trustees of the late Colonel Sir *Thomas Ramsay* of *Balmain*, Bart. It recited a bond for 2000*l.*, dated the 30th *March* 1829, given to the trustees by one *William Braidwood* and the defendant, and claimed a balance of 36*l.* 7*s.* 4*d.* to be due to them in respect of interest thereon at *Whitsuntide* 1838, and interest on such balance from the date of citation until payment and costs, and also interest "on all time coming," on the

ordained "to make payment to the pursuers (plaintiffs) as surviving trustees foresaid, of the foresaid 36*l.* 7*s.* 4*d.* as the balance of the interest upon the said heritable debt due at the term of *Whitsunday* then last, with the legal interest thereof, from the 30th *August* 1838, being the date of the citation following on the said summons, until payment; and also to make payment to the pursuers, as trustees aforesaid, of 4*l.* 4*s.* 5*d.*, being the legal interest from the foresaid 23d of *October* to the term of *Martinmas* last, of 1623*l.* 11*s.* 2*d.*, being the balance of the said heritable debt owing by the said *William Braidwood* to the pursuers; and also of 40*l.* 11*s.* 9*d.* at each term of *Whitsunday* and *Martinmas* thereafter, being the half-yearly legal interest of the said sum of 1623*l.* 11*s.* 2*d.* in all time coming; and likewise to make payment to the pursuers, as trustees aforesaid, of 13*l.* 2*s.* 11*d.* sterling of expenses of process as taxed by the auditor of court, together with 2*l.* 3*s.* 7½*d.* sterling, being the dues of extracting that decree," &c.] The replication then averred that, at the time that the said bond in the said summons and decree mentioned, was made and entered into by the defendant, to wit, on &c., he, the defendant, was resident in *Scotland* aforesaid, where the said bond was made and entered into by the defendant, who then had, and from thence continually has had, and has, certain real and personal estate within the said realm of *Scotland;* that by means of the said arrestments so caused to be used, and the said summons and citation done and performed, as in the replication aforesaid, the said court of Session had by the law of *Scotland* aforesaid, and by force of the said act of parliament, jurisdiction over the said action; and that the said decree made and pronounced as in the declaration mentioned, and in the replication set forth, was and is, by the law of *Scotland* aforesaid, binding on the defendant, notwithstanding the defendant was not in

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Ogle, in support of the demurrer. [*Tindal* C. J. The contest will be upon the sufficiency of the plea.] Decrees in *Scotch* courts stand on the same footing as other foreign judgments; and where a judgment of a foreign court is contrary to natural justice and common sense, it may be disputed in this country, without resorting to the court in which it was made, in order to set it aside. Here, the plea which is not demurred to contains an allegation that the decree is contrary to natural justice. [*Maule* J. Could that have been traversed? As I read the plea, it is only a conclusion of law from the facts stated, and not an allegation.] Assumpsit will lie on a foreign judgment where it is not opposed to natural justice; but where it is, the action cannot be maintained. Thus, in *Buchanan* v. *Rucker* (*a*) it was held, that no action will lie on a foreign judgment, where it appears on the face of it that the defendant was not resident within the jurisdiction of the foreign court, neither was served with process, nor came in to defend the action, although such judgment may have been obtained according to the course and practice of the court. [*Bosanquet* J. There the defendant never had been in *Tobago*.] Here, although it undoubtedly is stated in the replication that the defendant had been resident in *Scotland*, yet as the question turns upon the plea, it nowhere appears upon it that he had ever been in that country. [*Tindal* C. J. The plea does not allege that the defendant had never been in *Scotland*, but only that he was not there during the time of these proceedings, which would rather lead us to infer that he had been in that country.] In *Hall* v. *Odber* (*b*) Lord *Ellenborough* says, "Judgments in foreign courts are not to be considered upon the same footing as judgments in our own courts of record; they are but evidence of the debt;

(*a*) 1 *Campb.* 63. (*b*) 11 *East*, 118.

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where the party owed allegiance to the country in which the judgments are given against him, from being born in it, and by the laws of which country his property was, at the time these judgments were given, protected; and where the debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." [*Maule* J. A decree of a court of competent jurisdiction must be presumed not to be against natural justice. Should not the defendant have disclosed in his plea the facts requisite to render the decree invalid?] It was incumbent on the plaintiff, in his replication, to set out the facts which shew the decree to be good. [*Tindal* C. J. We think that you ought to have shewn in your plea that the decree was bad; but this you have not done, for you have abstained from making several necessary allegations.] The defendant was not in *Scotland* when the debt was contracted. [*Tindal* C. J. Although that was one of the circumstances relied on in *Douglas* v. *Forrest*, it is to be considered whether that fact is absolutely necessary to the validity of the decree.] In *Douglas* v. *Forrest* advocates were called to prove the *Scotch* law, of which this court cannot take judicial notice; *Male* v. *Roberts*. (*a*) [*Maule* J. If your plea ought to contain a direct allegation that the defendant did not know of these proceedings, I do not think it contains such an allegation. You have not negatived all the ingredients necessary to be denied in order to shew that the decree is contrary to natural justice. *Tindal* C. J. The process of horning is abolished by the 6 *G.* 4. *c.* 120. *s.* 51., which makes other provision for the citation and service of persons "forth of *Scotland*," by a delivery of a copy of the process at the Record Office. That statute

(*a*) 3 *Esp. N. P. C.* 163. 166.; *Millar* v. *Heinrick*, 4 *Campb.* 155. And see *Mure* v. *Kaye*, 4 *Taunt.* 34.; *Clegg* v. *Levy*, 3 *Campb.*

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that the defendant had no knowledge or notice of the proceedings. It is averred, in a very technical and artificial manner, that they were not notified to him, "according to the course and practice of the court." That may mean that he had no such notice, as he ought in strictness to have had; but it is very far from alleging that he had not notice of the proceedings. Then the plea goes on to state that he did not know of the proceedings so that he might, "by himself, his proctor, attorney, or other agent by him appointed and instructed in that behalf, appear or plead, or in any way defend himself in the said action,"—still leaving it open that he might have had notice, so as to enable him to apply to the court. It seems to me, that this plea, which ought to have been good *in omnibus*, is deficient in these important particulars, and consequently, it is unnecessary to consider the replication, as our judgment must be for the plaintiff, upon the insufficiency of the plea.

BOSANQUET J. I also think that this plea is insufficient. The declaration is framed in the usual way. It is not necessary to introduce into it any circumstances to shew that the decree on which the action is founded, is available in this country. The plea states that the decree is contrary to natural justice, and, therefore, inoperative and void. This is not traversable, being only a conclusion drawn from the matters of fact previously alleged in the plea. (*a*) Then, what are the grounds set forth to lead us to this conclusion? They are, that the defendant at the time of the commencement of the suit in which the decree was pronounced, or during its progress, was not in *Scotland*. The plea does not allege that the defendant was not born or domiciled in *Scotland*, or that he had not property there; nor does it

(*a*) *Vide Lucas* v. *Nockells*, 10 *Bingh.* 159.; 3 *Mo. & Scott*, 627.; 7 *Bligh, N. S.* 140.; and see 5 *Mann. & Ryl.* 468 *n.*

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this plea is, that the decree mentioned in the declaration is void; but, in order to establish that, the defendant ought to have alleged circumstances shewing either that the decree was not binding in *Scotland;* or that he ought not to be bound by it here, such decree being contrary to natural justice; as in *Buchanan* v. *Rucker*. The defendant has not attempted to set up the former proposition, and has failed in establishing the latter. The courts at *Westminster*, in sustaining decrees of foreign courts against absent persons, have decided, that, in their judgment, a decree may not be contrary to natural justice, although made against a party who is absent, for absence alone is not sufficient to invalidate the proceedings. Here, there is a declaration in assumpsit, founded on a good consideration, namely, a decree of the *Scotch* court; and the plea, in order to be an answer to it, should shew that under no circumstances can the decree be good. I am of opinion, with the rest of the court, that this plea is bad. In coming to that conclusion, we do not trench upon the law laid down in *Buchanan* v. *Rucker;* we merely say, in accordance with the ordinary rule of law, that, where the declaration is good upon the face of it, the plea should disclose something to shew that it is otherwise.

Judgment for the plaintiffs. (*a*)

Ogle applied to amend, but the court refused to give him leave to do so, nothing being suggested to induce a belief that the defendant had any merits.

(*a*) Si lex actui formam dat, inspiciendus est locus actûs, non domicilii, non rei sitæ; id est, si de solemnitatibus quæratur, si de loco, de tempore, de modo actûs, ejus loci habenda est ratio ubi actus sive negotium celebratur. Hertius, de collisione legum, s. 10. pl. 126.; and see *ibid.* 148, s. 59.; *Œuvres de Cochin*, tom. i. 72., tom. iii. 26., tom. v. 697.; *Œuvres de Daguesseau*, tom. iv. 637. 722.; 2 *Mann. & Ryl.* 581. n., 589. n.

engaged for the adverse party any promise or representation as to the steps to be taken in the cause. The introduction into affidavits of conversations with counsel, is calculated to destroy that independent position in which counsel ought to stand before the court.

Theobald, on the same side, stated that the attorney for the defendant had represented to him that he had been at the chambers of the counsel whom he meant to instruct to shew cause against the rule, but had not been able to find him; and that he thereupon desired the attorney to lose no time; but that the remainder of what was alleged to have been said by the defendant's attorney had not reached his ears.

Shee Serjt, in support of the rule. In a case where so much misconception seems to have arisen in the mind of the plaintiff's attorney, it is not too much to ask the court that the plaintiff should be let in, upon such terms as, under all the circumstances, the court may think reasonable, to shew cause against the rule for judgment as in cases of a nonsuit.

TINDAL C. J. I think that this rule ought to be discharged: the grounds upon which this application is made are such as would place counsel in a false position, and would be very injurious to the practice of the bar. The attorney, admitted to prosecute or defend, represents his client throughout the cause (*a*); but a

(*a*) The attorney being admitted *ad lucrandum vel perdendum* in the particular cause, it was formerly not unusual for the court to depute four knights to go to the party for the purpose of inquiring of him, whether he had really *attorned*, that is, substituted, the person who professed to be his attorney. This was afterwards rendered unnecessary by requiring the attorney to enter his warrant on the record. The practice of entering warrants of attorney on the record has lately been discontinued, without, however, returning to the antient practice.

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of *Devonshire*, and the tobacco, being taken out by salvors and housed, was afterwards sold to the plaintiff, who claimed to enter it at the lower duty as being "wreck," within the 3 & 4 *W.* 4. *c.* 52. *s.* 50. On the other hand, the defendant contended that as the tobacco was not "wrecked *upon importation*," it did not come within the statute.

The action had originally been brought in trover; but the court, after the decision of the Queen's Bench in *Barry* v. *Arnaud* (*a*), had allowed the plaintiff to amend his declaration, by substituting for the count in trover (*b*), a count in *tort* for a nonfeasance.

On the part of the defendant an application had been made to *Erskine* J., at chambers, for leave to plead, in addition to the plea of the general issue given by the 3 & 4 *W.* 4. *c.* 53. *s.* 107., six special pleas; but that learned judge refused to allow such pleas, unless the defendant would consent to strike out the words "by statute" in the margin of the general issue. The order made was as follows:—"Upon hearing counsel on both sides, I do order that the master be at liberty to draw up a rule for the defendant to plead the several matters specified in the abstract hereto annexed, *the defendant striking out "by statute" on the first plea.*

Wilde, Solicitor-General, on a former day in this term, had obtained a rule calling on the plaintiff to shew cause why the order should not be amended by expunging the words imposing the above condition on the defendant.

Channell Serjt. now shewed cause. By the rule of *H. T.* 4 *Will.* 4. (*c*), "pleas, avowries, and cognizances

(*a*) 10 *Ad. & E.* 646.; 2 *P. & D.* 633.

(*b*) See 6 *New Cases*, 240.

(*c*) "General Rules and Regulations," rule 5., 10 *Bingh.* 465.

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are void. The statute of *Anne* never meant to take away from a defendant the benefit of the general issue as a statutable plea; neither was it the intention of the recent act, that the party should lose that advantage if he sought in addition to plead any special matters. The rule of *H. T.* 4 *W.* 4. which has been cited, has no reference to the general issue by statute, but relates only to special pleas "varied in statement, description, or circumstances." Here, the defendant is a public officer, and he has no right to give up a defence with which he is invested for the benefit of the public at large; neither is it fitting that such a privilege should be taken away by mere implication alone. This case should be considered independently of the new rules. It is not true that by pleading the general issue in addition to special pleas, the modes of defence are multiplied. By the statute of *Anne*, the defendant is empowered to plead such matters, and by the Customs Act, 3 & 4 *W.* 4. *c.* 53. *s.* 107., he is at liberty to plead the general issue and give the special matter in evidence. It is submitted, that the privilege given to him by the latter act is not restrictive of the powers of the statute of *Anne*, but that the defendant may avail himself of the provisions of both enactments. *Neale* v. *M'Kenzie*, and *Fisher* v. *The Thames Junction Railway Company*, both occurred before the rule of court, *T. T.* 1 *Vict.*

TINDAL C. J. If this had been *res integra*, I should have felt considerable doubt whether the special pleas sought to be pleaded, in addition to the plea of the general issue by statute, fall within the rules of court regulating the putting of different pleas upon the record. For the object of those rules was, very much, to prevent the lengthening of the record, by means of pleas having reference to the same subject-matter of defence; and the plea of not guilty could not have the effect of

some particular statute, I do not think it was intended to allow him to plead special pleas. Undoubtedly, a practice grew up under the statute of *Anne* of allowing a great variety of pleas; but that course has been latterly thought to be wrong (*a*); and since the new rules, the courts have not considered themselves justified in permitting a party to plead specially, who chooses to avail himself of the plea of not guilty as a statutable defence.

MAULE J. I also think that this rule should be discharged. The statute of *Anne* allows a defendant to plead several matters, but the leave of the court has always been necessary for that purpose, although it became the practice to grant such leave without much consideration. If, before the new rules, it had been matter of right to plead various pleas, the judges could not have interfered with it; but it being competent for them to do so, the question is, whether the judge in this case was right in refusing to allow this defendant, in addition to the general issue by statute, to plead special pleas? The statutes which enable defendants to plead the general issue and give the special matters in evidence, confer all the power comprehended under that of *Anne*. They were intended, not to be cumulative, but in substitution. When a statute says that a party may plead the general issue and give the special matter in evidence, whether, upon that course being adopted, the courts are deprived of the power of allowing other pleas to be added by virtue of the statute of *Anne*, is a matter which it is not necessary to determine. But I think that it is a reasonable ground for refusing the defendant to plead special pleas in addition under that statute. In my opinion it would be giving a defendant a very unfair advantage if he were permitted to do so.

Rule discharged.

(*a*) *Vide Gully* v. *Bishop of Exeter*, 4 *Bingh.* 525. 2 *Moo. & R.* 105.

fence was to be established in respect of them. The pleas either relate to the same subject-matter, and are therefore not to be allowed, or distinct defences are intended to be set up under them, and consequently no hardship is inflicted upon the defendant by the order made by the learned judge. Wherever there is a probability that the rule of court may be violated, such a condition as the present ought to be imposed. [*Bosanquet* J. The application to the learned baron was made under the statute of *Anne*. It is a question whether the judge might not allow these pleas conditionally; in order to prevent the necessity of any application to him under the sixth rule of court.]

Channell Serjt., in support of the rule. It is evident that the defendant never could have consented to the condition imposed by the learned judge. It is submitted that the latter was not authorised in imposing that condition, inasmuch as the pleas in question are not "in apparent violation" of the rule of court, but are founded on distinct clauses of the 9 *Anne c.* 14., the statute against gaming. [*Bosanquet* J. Where the point is doubtful, I have always thought it a case of an apparent violation of the rule, and attached the usual condition. *Maule* J. If the judge's order be without jurisdiction, you may, should you succeed at the trial and you do not obtain your costs, move to have the costs on that ground. What need is there for you to make an application now?] It would be hard that this application should be rejected because it is one which may be made hereafter at another stage of the proceedings. [*Bosanquet* J. If you really intend to set up distinct defences under these pleas, how are you prejudiced by the order made? It may be that you have distinct defences, but do not know which you can establish.] If no restriction had been imposed, and we were to go to trial and

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the rule for rescinding the condition imposed upon the defendant by Mr. Baron *Rolfe*, must be made absolute. We do not think that it is necessary for us now to determine what is or what is not an apparent violation of the new rules of pleading. It appears to us that the defences set up by these two pleas are manifestly different (*a*); and, if so, the condition inserted in the order should not have been imposed. One of the pleas alleges that the money was lent for the purpose of gaming, and the other that the debt was for money lost at play. These pleas are founded on different parts of the statute 9 *Anne*, *c.* 14., and raise distinct defences. It is possible that there may have been but one transaction; but if the defences are in their nature different, we think that they are distinct defences within the meaning of the rules of *H. T.* 4 *W.* 4. (*b*)

It was urged that the order, as framed, had been drawn up with the consent of the defendant; but, upon looking into the affidavits, we do not find that to have been the fact.

Rule absolute.

(*a*) Both are founded upon the first section of the statute "for the better preventing of excessive and deceitful gaming," 9 *Anne*, *c.* 14., but upon distinct clauses in that section.

(*b*) See the fifth rule, prohibiting the use of several counts, pleas, avowries, or cognisances, "on one and the same principal matter;" 10 *Bingh.* 464, 465.; 3 *Nev.* & *M.* 2, 3.; and the sixth rule, prescribing the course of proceeding in order to enforce observance of the preceding rule; 10 *Bingh.* 466.; 3 *Nev.* & *M.* 4.

years (*a*) of the reign of His present Majesty, for raising the sum of 14,007,950*l.* by exchequer bills, for the service of the year 1836; that one of such bills was and is a bill for 1000*l.*, in form as follows: —

"No. 8551. 1000*l.* By virtue of an act 6° et 7° *Gulielmi* 4^ti^ *Regis*, for raising the sum of 14,007,950*l.*, by exchequer bills, for the service of the year 1836–7.

"This bill entitles or order to one thousand pounds, with interest after the rate of 2½*d. per centum per diem*, payable out of the first aids or supplies to be granted in the next session of parliament; and this bill is to be current and pass in any of the public revenues, aids, taxes, or supplies, or to the account of His Majesty's exchequer at the Bank of *England*, after the 5th day of *April* 1837.

"Dated, at the Exchequer, the 19th day of *December* 1836.

"*J. Newport.*

"If the blank is not filled up, this bill will be paid to bearer. The cheques must not be cut off."

That the residue of the instruments or securities in the declaration mentioned were and are respectively exchequer bills; that is to say, six exchequer bills for the payment of 1000*l.* each, in the same identical terms as the five exchequer bills, except that instead of being numbered 8551, they are respectively numbered 8552, &c., four exchequer bills (particularising the rest of the exchequer bills); that before, and at the said time when &c., the said blanks in the said bills, or the blank in any of them had not been filled up, and the said

(*a*) "Made and passed in the sixth year," or "made and passed in a parliament holden in the sixth and seventh years." As it is the king that enacts, and the bill could not have received the royal assent in both years, the allegation in the plea would probably have been held bad on special demurrer.

aforesaid; which keeping and detaining were and are the converting and disposing &c. Verification.

Upon the first and second pleas the plaintiff joined issue; to the third plea he replied *de injuriâ*, concluding to the country; upon which issue was joined.

At the trial before *Tindal* C. J., at the sittings after *Michaelmas* term 1837, a verdict was found for the plaintiff, subject to the opinion of the court upon the following case, with liberty to either party to turn the special case into a special verdict.

The plaintiff, a *Portuguese* merchant, up to the year 1834 resided at *Rio de Janeiro;* but in that year he returned to *Portugal*, and has since resided at *Lisbon* and other towns in that country.

Edward Burn, for many years before and down to his bankruptcy hereinafter mentioned, resided in *London*, and carried on business as a merchant, under the firm of *James Burn* and Co. The letters set forth in the plaintiff's appendix were given in evidence. They were the only evidence to prove that *Burn* acted as the agent in *London* of the plaintiff. He was the correspondent of the plaintiff, who from time to time remitted bills of exchange and money to him, and employed him, upon commission, to invest the proceeds in exchequer bills.

The defendants are bankers in *London*, and acted as such for *Burn* for many years before and since 1833.

The action is brought to recover the value of twenty-one exchequer bills, amounting to the sum of 10,100*l.*, and interest; and which exchequer bills were received by the defendants in exchange for the same number of exchequer bills, which had been purchased by *Burn* for the plaintiff in manner above mentioned, and which came into the possession of the defendants as hereinafter stated; and the defendants claim a right to hold the bills in question, in respect of the debt due from *Burn* to them, hereinafter particularly mentioned.

plaintiff to *Burn*, and after mentioning them, the letter proceeds: — "and with the remittances you will do what I ordered you in my above-mentioned letter of *May*."

The plaintiff, by letter of the 12th of *April* 1834, from *Rio de Janeiro*, which he was then about to quit for *Lisbon*, wrote to *Burn* and Co. as follows: — "I hope you will inform my attorney (*a*) of the name of the bankers in whose house the exchequer bills on my account have been deposited." *Burn*, by a letter of the 2d of *July* 1834, wrote to the plaintiff as follows: — "All the exchequer bills which we have bought by your order and for your account, you judge right are deposited, for greater security, in the hands of our bankers, as we advised you. They are entirely at our order, which is necessary for the purpose of exchanging them for others every time it is advertised to the public that the interest is to be paid; which payment cannot be received without delivering up the bills upon which the interest is due, when you receive other bills for the amount, for which reason it cannot be of any service to you knowing the name of our bankers."

Between *May* 1832 and *December* 1836, *Burn*, with funds partly supplied by the plaintiff, and partly obtained by payment of the interest on the exchequer bills, purchased, by the order of the plaintiff, in manner above mentioned, exchequer bills to the amount of 30,400*l*. The exchequer bills were purchased by *Burn* through a broker, the broker dealing with *Burn* as a principal, and not knowing on whose account they were bought. The following is the form of the bought notes, or accounts, furnished by the broker to *Burn*: —

(*a*) The person designated by the word here translated "attorney," was the plaintiff's brother and agent, left at *Rio de Janeiro*, as appears from the correspondence in the appendix.

hands for a considerable time; but *Burn* was not particular as to the time. *Burn* then deposited the new exchequer bills in his said box.

The defendants gave credit to *Burn*, in his account with them, for the interest which had been received; and such interest formed part of the cash balance to the credit of *Burn*'s account with the defendants.

On one occasion, before *December* 1836, but at what particular time cannot be ascertained, *Burn* delivered a number of exchequer bills to the defendants for the purpose of receiving the interest and exchanging the bills as usual, but did not ask the defendants for the bills received in exchange, for one or two months. *Burn* afterwards, having occasion for a part of the bills, applied for them, when the defendants said they had rather *Burn* would take the whole of them, which he accordingly did, and locked them up.

In the month of *November* 1836, *Burn* held exchequer bills, so as aforesaid purchased with the money of the plaintiff, to the amount of 30,400*l.*, and which were locked up in the box at the defendants', with two others belonging to another correspondent of *Burn*, named *Abrue*; and the plaintiff, by a letter, set out in the appendix, dated the 3d of *October* 1836, ordered *Burn* to sell exchequer bills to the amount of 10,800*l.*, upon which the interest would be due the 22d of *June* 1837, and to invest the proceeds in the purchase of bills of exchange to be remitted to the plaintiff's correspondent at *Rio de Janeiro*. *Burn* sold the exchequer bills in his own name, as principal, through a broker, who knew him only in the transaction; and the proceeds were paid by the broker to *Burn* in cheques payable to *Burn*, who paid them to the defendants, as his bankers, to his account, as his own money, and they then formed part of his cash balance to his credit with the defendants. *Burn* advised the plaintiff of the sale of the

in which they were kept the said exchequer bills then held by him, *Burn* being at that time alone in the anteroom, and took them into the banking-room, and delivered them to one of the defendants, and addressed him, saying, "Will you have the kindness to get these bills exchanged for me?" The exchequer bills so delivered were in the following form. [The form was then set out as *suprà*, 908.] The others were in the same form. The blanks in the exchequer bills had not been filled up; and they were securities payable to bearer, and transferable by delivery. The defendants counted the bills, repeated the number to *Burn*, who said "Right," and no further conversation passed upon the occasion. The defendants, on the 20th day of *December*, delivered up the bills so received from *Burn*, receiving the interest due upon them, and obtained in exchange the new exchequer bills, the value of which is sought to be recovered in this action, and two others. The particulars of the exchequer bills delivered up, and of those received in lieu of them, are set forth in the appendix No. 1. At the time *Burn* delivered the exchequer bills to the defendants, as last mentioned, he was unwell, and within a few days afterwards became worse, and was, owing to such illness, absent from his counting-house three or four weeks, at his house in the country at *Roehampton*; and was not, during that period, in town above three times until his subsequent failure in business, which took place on the 23d of *January* 1837, as hereinafter mentioned. *Burn*, during this period, was unable to attend to his business, except on particular occasions, but communicated with his clerks when any thing was wanted. He was informed of the state of his cash at his bankers', and signed cheques and accepted bills (when necessary), and letters were from time to time brought to him to read and sign, and he was informed of the payments made to the defendants on his

defendants or some of them being present, *Burn* observed to one of the defendants, that they were very troublesome, and that it was very troublesome to have charge of so many foreign securities: that such foreign securities so referred to were *Brazilian* bonds, *Portuguese* bonds, *Dutch* bonds, and the like; but there were no foreign securities in the box in which the exchequer bills were deposited.

It was *Burn*'s course of business to make his bills payable at the defendants (who had been his bankers for many years); which bills the defendants paid at maturity, having always had funds of *Burn*'s in their hands for that purpose. *Burn* also drew cheques upon the defendants, as his bankers, in the usual way, which they paid according to the usual course of business.

Upon the 21st of *January* 1837 bills of exchange were outstanding which had been accepted by *Burn* and made payable, according to the usual course of business, at the defendants' banking-house, to the amount of 4,808*l.* 10*s.* 7*d.*, and which became due on that day. The particulars of such bills are set forth in the appendix No. 14. These bills were presented for payment at the defendants', and were paid by them. The balance upon *Burn*'s account, on the morning of that day, amounted to the sum of 1596*l.* 11*s.*; but by the payment of the said bills the balance was absorbed, and the balance turned against *Burn* and in favour of the defendants, to the amount of 3,211*l.* 9*s.* 7*d.*; for which sum the defendants insist upon their right to hold the exchequer bills, the value of which is sought to be recovered in this action. Either party to be at liberty to refer to *James Burn* and Co.'s pass books with the defendants as the bankers of that firm.

The question for the opinion of the court is,—whether the evidence was sufficient to entitle the plaintiff to a verdict on all or any of the issues.

with the liquidation of my affairs in this place, which may serve for your government, and hope you will inform this my attorney of the name of your bankers, in whose house the exchequer bills on my account have been deposited."

Extract from the twenty-fifth letter annexed to appendix No. 7., from the plaintiff to *James Burn* and Co., dated *Oporto*, 4th *June* 1835.

"I have to claim from you interest on the moneys which came into your possession on my account up to the time of completing my orders, since you always observe this practice, as you have done in the account made up to the 4th *July* 1833, and have always done so with your correspondents in *Brazil* and in this city also; and other respectable houses in your place do the same with their old friends. It seems to me a just demand on my part, as you never informed me of any thing to this effect; and I shall therefore thank you to consider this, and place the amount to the credit of my account, and advising me, that we may proceed in conformity."

Extract from the 26th letter annexed to appendix No. 7., from *James Burn* and Co. to the plaintiff, in answer to the foregoing, and dated *London*, 10th *July* 1835.

"And we have now to inform you that we do not allow interest to our correspondents when they allow their funds to remain only a short time in our possession. The same is the custom of other houses in this city; and we only allow interest when the said funds are allowed to remain a considerable time in our hands, and with the condition, that when said funds are required, you are to value on us in bills drawn at sixty days date, or in case we are to make remittances, you must give us previously timely notice. Otherwise it would be impossible for us to allow you interest. Notwithstanding, as you were not aware of those conditions,

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greater security of my small fortune." The numbers of the exchequer bills purchased on each day were forwarded to the plaintiff; and when any of these securities were to be sold, he particularly specified which were to be disposed of. The exchequer bills were not lodged or deposited with the defendants. *Burn* kept the key of the box, and dealt with the contents according to the written orders received by him from the plaintiff. The third plea, therefore, is not proved. Though that plea is prepared with some dexterity and skill, it depends, after all, upon the double meaning of the terms "receiving, holding, and retaining." According to the true construction of the plea, it is submitted that it amounts to nothing more than the statement of an ordinary course of a banking account between the defendants and *Burn*. It represents that the exchequer bills were deposited with the defendants in the usual way, without any thing to denote that they were not the property of the party so depositing. The plea passes by the rest of the circumstances under which possession *de facto* was obtained by the defendants. *Burn* had not been in the habit of making the defendants depositaries of his securities. There was nothing to indicate any intention on the part of *Burn* that the defendants should be at liberty to deal with securities kept by him at their banking-house. When securities are placed in the hands of a banker in the ordinary way, the banker enters the amount, short, in the pass book. It appears by *Burn*'s pass book, set out in the appendix, that on the 21st of *October* the amount of certain navy bills was entered short to the credit of *James Burn* and Co.; but these exchequer bills are not entered, short, in the pass book, nor are they noticed in any book whatever as between *Burn* and the defendants. The latter never were depositaries of these exchequer bills; nor were they ever delivered to the defendants at all, except

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upon account of the exchequer bills, and thereby created a lien on them in favour of the defendants. If the plea is true, *Burn* was guilty of a misdemeanor; and a misdemeanor for the commission of which he had no assignable motive, as he was not going on. The failure taking place on the same day, the payment of *Burn*'s acceptances was, for the purpose of sustaining his credit, entirely useless. The probability is, that these acceptances were paid through inadvertence. There is nothing to warrant the inference that *Burn* expected that the defendants should make payments, on his account, upon the credit of the exchequer bills. The acceptances had been made payable at the defendants' house long before. It was therefore not like the case of payment of cheques drawn the same morning. The mere circumstance of *Burn*'s not sending instructions to the defendants,—his omitting to say, "don't pay,"—is the only circumstance which can be laid hold of in their favour. [*Maule* J. "Don't pay" would have been the language of a person who expected that his bankers would pay, unless they were directed not to do so.] Before that time the defendants never had made payments on account of *Burn*, except out of funds in hand. It may be admitted that, according to *Collins* v. *Masters*, *Burn* might have bound the plaintiff by his contracts in respect of these exchequer bills; but, though his contracts might have bound the plaintiff, his negligence cannot do so. General possession in the course of business would, no doubt, give a lien; and the legal effect of the defendants' third plea is, though course of business is not expressly mentioned therein, that they claim to be entitled to a lien upon these exchequer bills, as being received by them in the course of business.

Sir *W. Follett*, *contrà*. No question arises here as to the goodness of the third plea. There is another

carried to account, in order to give the banker with whom they are deposited, a lien upon them. Put the case of securities deposited for safe custody. Suppose exchequer bills to be placed in the hands of a banker, with directions to receive the interest and exchange the bills, the banker would have a lien upon them, without any express agreement that he should have a lien. [*Maule* J. If a plea is capable of being understood in two senses, it must be understood in that sense which makes it an answer to the action. No doubt *Burn* could have made a good title to any person to whom he chose to transfer, or give a lien upon, these exchequer bills.] The defendants would not have paid *Burn*'s acceptances unless they had held some security. The acceptances were paid upon the faith of the exchequer bills. *Burn* could not have taken the exchequer bills out of the custody of the defendants, without satisfying the balance of his account. To create a lien, it is not necessary that there should be a contract, or even an intention, to give a lien; *Davis* v. *Bowsher*. (*a*) In giving judgment in that case, the court laid down the rule, that a banker has a general lien upon all paper securities in his hands belonging to any particular person, for his general balance, unless there be evidence to shew that any particular security was received under special circumstances, which would take it out of the common rule. [*Erskine* J. In that case the bills were paid in upon the general account. Suppose bills were sent to a banker for the mere purpose of getting them accepted. (*b*) *Tindal* C. J. Suppose exchequer bills sent from the country, to be returned by the post, and

(*a*) 5 *T. R.* 488. Acc. *Tooke* v. *Hollingworth*, *ib.* 215. and 2 *H. Bla.* 503.; *Bent* v. *Pullen*, 5 *T. R.* 494.; *Jourdaine* v. *Lefevre*, 1 *Esp. N. P. C.* 66.; *Parke* v. *Eliason*, 1 *East*, 544.; *Scott* v. *Franklin*, 15 *East*, 428.

(*b*) *Vide Lucas* v. *Dorrien*, 7 *Taunt.* 278., 1 *B. Moore*, 29.

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not been denied on the part of the plaintiff, that *Burn* might have given a good title to these exchequer bills, by pledging them to an innocent party.

No distinction can be made between the different securities which come into the hands of a banker in consequence of the holder of those securities being a customer of such banker. At all events, the defendants might look to the accruing interest upon these exchequer bills, as an available fund to answer their engagements for *Burn*. The interest formed an item in the banking account, and it was entered in the pass book accordingly. Whether any dealing with these securities by the ostensible owner could be said to amount to a misdemeanor, would depend upon the intention of the party. If the bankers had a general lien upon exchequer bills, they must be considered as having made advances on the credit of these exchequer bills. It is not clear that an action might not have been maintained by *Burn* against the defendants, had they, with such disposable funds of his in their hands, refused to honor the acceptances which he had made payable at their house. (*a*)

If the third plea is bad, it would have been better if the plaintiff had demurred to it, or replied specially,

(*a*) When a guarantee for future advances is given by a third person, the party accepting such guarantee contracts no engagement to make advances, 3 *Nev. & M.* 200, 201 n.; nor, it would seem, does any such obligation arise upon a deposit of goods for a similar purpose. See *Marzetti* v. *Williams*, 1 *B. & Adol.* 415., as to the legal obligation of bankers to pay a cheque drawn by a customer, and presented for payment within a reasonable time after the customer has placed sufficient funds in the hands of the bankers. When even the true owner of exchequer bills deposits them with his bankers expressly as a security, the bankers would not, without a special contract, be bound to honour his cheques, &c. out of their own moneys, nor could they be required to make payments out of the proceeds of the exchequer bills, without notice of an intention to draw against such proceeds, and without being allowed sufficient time to realise them.

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But in this case the exchequer bills are not entered any where; no book containing any entries relating to these exchequer bills was offered to be produced. Lien can only arise by contract, either express or implied. In *Bolland* v. *Bygrave* (*a*), *Abbott* C. J. is reported to have said, "It appears that at the time the bankrupts had discounted bills for *Tavernier* to a large amount, which were still unpaid, they had also accepted a bill for his accommodation to a large amount, not then due; and I think that a banker who stands in this relation to a customer, has a lien upon any securities of that customer which may, for *any purpose*, be placed in his hands." But the words for any purpose must be understood with reference to the case. [*Maule* J. It means "for any purpose suggested."] When the document was left by accident with the banker after he had refused to advance the money upon the credit of this document, it was held that no lien arose: *Lucas* v. *Dorrien.* (*b*) The receipt of interest by *Burn* was incidental to his agency, and raised no presumption that he was the owner of the exchequer bills; nor was there any representation upon his part that he was such owner. Nothing was done by *Burn* but what was absolutely necessary to be done by the broker of a foreign merchant who had invested property in these securities. On the contrary, the manner in which these exchequer

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the account at the same time that the amount of the bill is entered full on the credit side. But with respect to exchequer bills, which are worth more or less according to the state of the market, there seems to be a difficulty as to the amount for which they should be entered short; and whether they were entered short for the nominal value, with or without the interest then due, or for the market price of the day, the subsequent full entry, made upon the exchequer bills being paid off or sold, would be of a different amount, unless indeed separate entries were made of the principal, of the interest, and of the profit or loss.

(*a*) *Suprà*, 928.

(*b*) *Ibia*

possessed; thirdly, a special plea claiming to hold the exchequer bills as a security for advances made by the defendants as bankers for *James Burn* and Co., who kept an account with them. The cause came on for trial on the 21st of *December* 1837, when a verdict was found for the plaintiff, subject to the opinion of the court upon a special case.

That case stated, in substance, that *Edward Burn* (who traded under the firm of *James Burn* and Co.), was a merchant in *London;* the agent and correspondent of the plaintiff, who was a *Portuguese* merchant, and who resided, up to 1834, at *Rio de Janeiro*, and who since that time has resided in *Portugal;* and that the defendants were bankers in *London*, and had acted as such for *Burn*, for many years before 1833, and down to the time of the transaction in question.

It appears from the correspondence set out in the appendix to the special case, that *Burn*, in and after the month of *May* 1833, had, at different times, bought, on account of the plaintiff, and with his money, exchequer bills to a considerable amount; that he kept several tin boxes at the defendants' banking house, in each of which he deposited, separately, the securities he had bought for his different correspondents, and, in one of those boxes, the plaintiff's exchequer bills: such boxes being locked, and the keys remaining in the possession of *Burn*. Those bills had been bought in pursuance of orders sent by the plaintiff to *Burn*, who, on executing the orders, had sent accounts to the plaintiff containing particulars of the bills purchased. *Burn* had also occasionally sold and delivered portions of the exchequer bills by the order of the plaintiff. It is the custom for bankers to receive the interest on the exchequer bills of their customers, and to exchange the exchequer bills when such interest is paid; and the defendants had done so on various occasions for *Burn*, at his request, prior to

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to find any facts or to draw any inferences, which, in the opinion of the court, a jury ought to have drawn.

Upon these facts it appears to us to be clear, and indeed it was not denied by the learned counsel for the defendants, that the exchequer bills in question were the property of the plaintiff, and that he is entitled to recover their value, unless the defendants have acquired a right to retain them as a security for the advances made by them on account of *Burn* on the 21st *January* 1837. The defendants contended, and we think it is established by the cases cited for that purpose, that this right, if it exists, might be shewn, and would amount to a defence, under their second plea, "that the plaintiff was not lawfully possessed."

In order to shew that the defendants had the right in question, it was argued, first, that exchequer bills fall within that description of property to which a good title may be acquired by a party who takes it *bonâ fide* for value, notwithstanding any defect of title in the party from whom it is so taken. This proposition is established by decided cases; and it was not controverted on the part of the plaintiff, whose learned counsel admitted that *Burn* might have made an effectual pledge of the exchequer bills to a person taking them *bonâ fide*, although such pledge would have been without authority from, and in violation of the rights of, the plaintiff. It was further argued on the part of the defendants, that such a pledge did, in fact, arise out of the circumstances stated in the case. It was contended, that the defendants, being bankers, and having no notice of the interest of the plaintiff in the exchequer bills, had a lien on them for their advances made to *Burn* from whom they received them: and cases were cited which shew that bankers have a general lien on the securities of their customers in their hands, unless there be something to shew that such lien was not intended to arise.

and property of this description, are left to the operation of the general contract between the banker and his customer, which leaves untouched the title of third parties.

And we are of opinion that there is nothing in the circumstances of this case amounting to a representation to the bankers, that the exchequer bills in question belonged to *Burn*, or that he had authority to pledge them. The manner in which the exchequer bills of the plaintiff, for which those in question were given in exchange, were kept, — the purpose for which they were put into the hands of the defendants, — the circumstances in which the exchequer bills in question were received and kept by the defendants, — are all at least as consistent with the exchequer bills belonging to a third person, as with their being the property of *Burn*. So, also, the placing of the interest received by the bankers to the credit of *Burn*'s account, is the very course that would have been pursued by the bankers if it had been known to them that the exchequer bills were the property of the plaintiff.

If *Burn* had, by express words, or in any other manner, pledged the exchequer bills to the defendants, it was not denied he would have been guilty of a statutable misdemeanor; and, independently of any statute, he would have been guilty of a fraudulent violation of his duty to his principal. There is nothing, we think, in this case, to shew any such intention on his part; and we are of opinion, upon the whole, that there is no ground for any claim on the part of the defendants beyond what *Burn* himself could have enforced, and that, consequently, the plaintiff has a right to the bills in question.

It was argued for the plaintiff that, even if the exchequer bills had been the property of *Burn*, the defendants could not have had any lien under the circumstances in which the same came to their possession. As, however, we think that, at all events, there is no

should not be repaid to the defendant, the House of Lords having reversed the judgment which had been pronounced against him in the court of Exchequer Chamber. (*a*)

Storks Serjt. now shewed cause, and, on the part of the plaintiffs, claimed, that out of the above moneys, should be retained the costs of a demurrer in this court, which had been decided in their favour. (*b*) The plaintiffs are clearly entitled to those costs; and the question is, what construction the court will put upon the words "in lieu of bail," and whether, at all events, they will not exercise an equitable jurisdiction by giving the plaintiffs the costs of the demurrer out of the sums so deposited.

Bompas Serjt., *contrà*, was stopped by the court.

TINDAL C. J. How can we lay our hands on this money, which was paid into court for a specific purpose? It was deposited in lieu of bail in error. The bail could not have been made answerable for bygone costs. (*c*)

The rest of the court concurred.

Rule absolute.

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court, or some judge thereof, unless a recognisance, with condition according to the statute of 3 *Jac.* 1. *c.* 8. be first acknowledged in the same court." The court would, under this enactment, have power to make an order staying execution without a recognisance of bail in error, if the defendant in error objected to the depositing of money in lieu of bail. After the rule *nisi*, mentioned in the report in 2 *Moo. & Scott*, was obtained, a rule for paying money into court in lieu of bail was drawn up by consent.

(*a*) And see *Gwynne* v. *Burnell*, in error, 6 *New Cases*, 453.; 1 *Scott's N. R.* 711.

(*b*) See *Collins* v. *Gwynne*, 7 *Bingh.* 423.; 5 *M. & P.* 276.

(*c*) *Vide* 3 *Jac.* 1. *c.* 8.; and as to the form of the recognizance of bail in error, see *Lill. Entries*, 519.; *Tidd's Forms of Practical Proceedings*, 6th ed., 581, 582, 583, 584, 585; 8th ed., 529, 530, 531, 532, 533.

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Bompas Serjt., in support of the rule. The appointment to reduce having been given for the 10th of *November*, it was impossible to summon the special jury in time for the trial on the 11th, two clear days being necessary for that purpose. In *Gunn* v. *Honeyman* (*a*) it was held, that a rule for a special jury must be served sufficiently early to enable the opposite party to strike the jury before the day of trial. It may be admitted that the defendant complied with the terms of the rule of *H. T.* 1 *Vict.*, by making his application for the special jury in time; but that alone was not sufficient; he should have taken care to have had it reduced; so that the jury might have been properly summoned.

Channell Serjt. It was owing to the plaintiff's not attending the appointments that there was not time to summon the special jury. If the plaintiff had attended the first appointment to reduce, there would have been sufficient time to summon the jury; besides, there was no chance of the cause being tried at the sittings in term. [*Tindal* C. J. You are not to assume, that, because it is not usual to try special jury causes during term, you may relax in your endeavours to obtain a special jury.]

The Lord Chief Justice then desired the appointment to reduce to be handed up to the bench, and on *Bompas*'s objecting to its being referred to, said that they might look at the appointment as an act of court.

TINDAL C. J. There seems to be a good deal of confusion in this case, and the better course appears to be to direct the cause to be tried by a special jury at the last sitting in term. The case that has been cited is consistent with good sense: the general rule undoubtedly is, that the party who applies for a special

(*a*) 2 *B.* & *Ald.* 400.

Whether he is clerk to the attorney in the cause, or to a merchant, is immaterial. The word "clerk" is sufficiently intelligible, and I do not think that he is bound to state the profession of the person with whom he is clerk.

Channell Serjt. then objected, that the rule had been drawn up — on reading the rule for the distringas, — but not — on reading the affidavits on which the latter rule had been obtained; neither had the defect been supplied by any affidavit shewing the ground on which the court had granted that rule. He then proceeded to argue upon the insufficiency of the affidavits on which the present rule was founded.

Bompas Serjt., in support of his rule, submitted that his affidavits were sufficient to shew that the rule for the distringas had been obtained in fraud of the court, and to entitle the defendant to ask for its discharge. [*Tindal* C. J. We are left very much in the dark. Why have you not brought before the court the facts which were before it when the rule for the distringas was granted, and answered them?] Although the distringas may have been granted on what appeared to be a very clear affidavit, a defendant may afterwards come to the court with unequivocal grounds to shew that it should not have been issued. [*Tindal* C. J. But you do not shew unequivocal grounds on your affidavits. There is a strong presumption that the court were right in granting the distringas.] It is impossible to doubt, on these affidavits, that the defendant has been abroad ever since 1837, and the court will not allow the rule for a distringas to continue on this state of facts, which are uncontradicted on the other side.

TINDAL C. J. The real question is, whether my brother *Bompas* is in a condition at present to make

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and 40*l.* respectively parcel, &c. Secondly, a set-off, except as to the 15*l.* 19*s.* 7*d.* and the 40*l.*, for goods sold and delivered, for money lent, for money paid, for money had and received, and upon an account stated. Thirdly, as to the 15*l.* 19*s.* 7*d.*, payment and acceptance in satisfaction before action brought. Fourthly, as to the 40*l.*, payment into court.

Replication, to the first plea, similiter; to the second, non indebitatus; to the third, that the plaintiff admits the payment and acceptance of the 15*l.* 19*s.* 7*d.*, and that as to that sum he is satisfied (*a*); to the fourth, that the plaintiff accepts the sum paid in, and prays judgment for his costs.

The first item in the plaintiff's particulars of demand was, a sum of 500*l.* as the amount of two years' salary, from the 1st of *June* 1834, at 250*l.* per annum. This was followed by several disbursements, making a total of 891*l.* 4*s.*, the plaintiff claiming a balance of 230*l.* 15*s.* 11*d.* The defendant's particulars of set-off claimed 644*l.* 8*s.* 6*d.*, for sums paid and books sold to the plaintiff.

At the trial, before *Tindal* C. J., at the *London* sittings, after *Michaelmas* term, 1838, the following facts appeared: —

The plaintiff had been a clerk in the counting-house of the defendant, an extensive bookseller and publisher, under the following circumstances: In *May* 1834, an agreement in writing was entered into between Alderman *Magnay*, the brother of the plaintiff, and the defendant, in contemplation of a partnership between them. It formed part of this preliminary arrangement, that the plaintiff should enter the defendant's counting-house as a clerk, at a salary to be afterwards fixed; and accordingly he entered the defendant's service in *July* 1834,

(*a*) *Vide antè*, 242.

upon the application of the plaintiff, certified for a special jury.

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In the following term *M. D. Hill* obtained a rule *nisi* for leave to enter a nonsuit, on the point reserved, or for a new trial, on the ground of surprise, the statement made by Mr. Alderman *Magnay*, as to his having received no interest upon the 10,000*l.* until after the determination of the negotiation for the partnership, having, it was stated, turned out to be unfounded.

Wilde, Solicitor-General, and *Whateley* now shewed cause. There is no ground for the application, either for a nonsuit or for a new trial.

Upon the first point, it is submitted that the plaintiff was not bound to produce the memorandum of *May* 1834. When the plaintiff closed his case he had proved enough to entitle himself to a verdict, by evidence of a parol agreement to pay him a salary of 250*l.* a year; and no distinct evidence had been given of the existence of any written memorandum with respect to the plaintiff's services and salary, until it was set up by the defendant; who, if he meant to avail himself of the circumstance of there being a written agreement relating to the plaintiff's services, was bound to produce the document, and in such a state as to render it legally receivable in evidence. The plaintiff was not a party to the agreement, intended to be set up, as signed in *May* 1834; and, for anything which appeared at the trial, he may have been an entire stranger to the contents of that agreement, at the time it was signed. It did not appear that his brother had any authority to enter into such an agreement on his part, neither was it shewn that it had been ever acted upon.

With respect to that part of the rule which relates to

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a new trial, on the ground of surprise, it is a sufficient answer, that the mistake of the witness, in asserting that he had received no interest for the advances made by him during the continuance of a negotiation for a partnership, formed no part of the matters in question between the parties to the suit.

M. D. Hill and *Hayward* in support of the rule. It is clear that the services of the plaintiff took place under a written agreement, made between Alderman *Magnay* and the defendant, to which the plaintiff afterwards became a party. [*Tindal* C. J. You must not consider it as conceded that there was an agreement between the plaintiff and Alderman *Magnay* and the defendant. There was undoubtedly an agreement between the two latter; but what evidence was there that Alderman *Magnay* was authorised by the plaintiff to enter into an agreement that he would serve the defendant? You want the authority of the plaintiff to bind him by that agreement.] The point as to the absence of authority was not made at the trial. Alderman *Magnay* did not pretend that he had entered into the negotiation without the plaintiff's knowledge. Even supposing the latter not to have known of the written agreement, that is immaterial; for the written agreement was merely the mode adopted by Alderman *Magnay* of executing his authority. It is clear that the plaintiff either authorised the making of the agreement, or recognised it afterwards. When that which took place corresponds so exactly with that which was provided for, the inference is irresistible that the parties were acting under the written agreement. [*Tindal* C. J. Upon the evidence, as given before me, would an action have lain against the plaintiff for not going into the defendant's employment? *Bosanquet* J. It is usual to introduce a clause into partnership deeds providing for

the bringing in of the sons of the partners; but such a stipulation is not binding on the former.] All that is done is consistent with the written agreement, and there is no proof that it was ever put an end to; and that being so, the question is, who was bound to produce it? Here, the agent who made it was called by the plaintiff as a witness. If he had not shewn a most singular deficiency of memory, he would have proved the existence of the agreement; and the court will not establish the rule, that because such agent could not, or rather did not choose to, recollect the agreement, the onus of producing it was thrown upon the defendant. The case was not one of surprise; for the plaintiff had had notice to produce the agreement, and his brother had been served with a subpœna duces tecum; which distinguishes this case from several of the authorities upon the subject. [*Tindal* C. J. So far as the evidence on the part of the plaintiff went, there was a complete blank with respect to this agreement. The question is, whether the defendant, if he wished to avail himself of the agreement, was not bound to produce it.] In *Whitford* v. *Tutin* (*a*), the plaintiff had been employed as secretary to the committee of a charitable society, pursuant to a resolution entered in the book of the committee, of which, during his service he had had the care. The society being afterwards dissolved, the plaintiff sued some of the members of the committee for his salary. It was held, that he ought to produce the book containing the resolution under which he was engaged. *Tindal* C. J. there says, "it has been further urged that the plaintiff is no party to the resolution, which was entered into before his appointment as secretary. But if the plaintiff accepted the situation, and the benefit attached to it, in pursuance of this resolution, he is

(*a*) 10 *Bingh.* 395.; 4 *M. & Scott*, 166.

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a year would be a fair remuneration for those services. So far was the defendant (according to the brother's evidence) from disputing that the plaintiff was entitled to that sum, that he left it to the witness to say whether the plaintiff should not have a larger salary. The case did not rest solely on the testimony of the brother; for a document was produced in the handwriting of the defendant, in which 250*l.* was stated to be the salary payable to the plaintiff. The brother was cross-examined at great length, in order to obtain from him an admission that there was an agreement in writing relating to the plaintiff's employment; but he denied that there was any such agreement. The plaintiff's case then closed without anything appearing, to shew that there was a written agreement. Was the defendant at that time in a condition to call for a nonsuit, or did he do so? On the contrary, he produced a paper purporting to be an agreement, which was unstamped. How could I allow that paper to go to the jury? I could no more do it for the defendant than I could have done it for the plaintiff, if he had attempted to put it in evidence. *Stevens* v. *Pinney* (*a*) was a case almost precisely similar to the present. There, in an action on the common counts for work and labour, it was held, that the plaintiff, having established his case by other evidence, was not precluded from recovering by the defendant's proving the existence of an unstamped agreement. *Dallas* J. there said (*b*), "It is clear that if it had appeared, as part of the plaintiff's case, that there was an agreement in writing regulating the price and terms of the work to be performed, he must have produced it; and when produced, it could not have been received in evidence, being unstamped; and the plaintiff then must have been non-

(*a*) 8 *Taunt.* 327.; 2 *B. Moore*, 349.

(*b*) 8 *Taunt.* 329.

put in the document, properly stamped, as part of his case. In addition to *Stevens* v. *Pinney*, which has been already cited by my Lord Chief Justice, *Reed* v. *Deere* (*a*), is a direct authority; *Littledale* J. there says, "If a plaintiff gets through his case without giving the defendant any opportunity of mentioning the written agreement, the latter must produce it; and he cannot avail himself of it unless it be duly stamped." So also, in *The King* v. *The Inhabitants of Padstow* (*b*), on the trial of an appeal against an order of removal, the respondents having proved, by parol, the renting of two fields in the appellant parish at 15*l.* a year, and an occupation and payment of the rent for a whole year, the appellants gave in evidence that the contract for taking the two fields was reduced into writing; it was held that it lay upon the latter to produce the written contract. *Parke* J. there says, "The rule is very clearly settled, that if it comes out, on the cross-examination of the plaintiff's witnesses, that there is a written instrument, he must produce it; but if he makes out a *primâ facie* case without shewing that there was any written contract, the other party, if he relies on that written contract, must produce it." It is not necessary to enter into the question of authority, or to consider how far the plaintiff was a party to the agreement. It is very common to introduce into partnerships a stipulation that the partners shall be at liberty to introduce a relative into the concern; but such a clause does not give the latter a right to insist on being so employed.

With respect to the misstatement made by the plaintiff's witness, as it was on a matter quite foreign to the question in issue between the parties, it clearly furnishes no ground for granting a new trial.

(*a*) 7 *B. & C.* 261.

(*b*) 4 *B. & Ad.* 208.; 1 *N. & M.* 9.

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COLTMAN J. I am of opinion that this rule should be discharged. When a defendant considers a contract material, he ought to get it stamped: should he not do so, he runs the risk of the plaintiff making out his case without it. It has been sought to establish a distinction here, on the ground that if the plaintiff's witness had admitted the truth, the existence of the agreement would have appeared during the plaintiff's case; but it is not advisable to introduce exceptions to a rule which is most reasonable in itself, and which is found to be convenient in practice.

With respect to the second point, the plaintiff's witness seems to have made a great mistake; but that was on a matter foreign to the issue, and which was not likely to have weighed with the jury. If the consequence had been that they had given excessive damages, I should have been disposed to grant a new trial; but that does not appear to have been the case.

MAULE J. The plaintiff concluded his case without its appearing that there was a written agreement between the parties. There are numerous cases to shew that if a plaintiff does so, and the defendant means to set up that there is an agreement in writing, he must produce it. It has been sought to distinguish this case from some of the authorities which have been cited, on the ground that here a notice to produce the document was given to the plaintiff; but that appears to me to introduce no material distinction. Moreover, here the agreement seems not to have been between the plaintiff and the defendant, but between the latter and the brother of the plaintiff, and consequently it was not binding on the plaintiff, and there was no necessity for him to give it in evidence.

As regards the second ground, namely, the mis-state-

ment alleged to have been made by the plaintiff's witness, I do not think that it furnishes any reason for setting the verdict aside. It would throw great uncertainty on verdicts if motions for new trials were encouraged on the ground that a fact has been mis-stated, which may have had some effect, by way of prejudice, upon the jury.

Rule discharged.

CHESSER *v.* RIDGWAY.

Nov. 16.

CHANNELL Serjt. had obtained a rule, calling on the plaintiff's attorney to shew cause why the trial of this cause should not be postponed until the sittings after *Hilary* term. The affidavit on which the application was grounded, stated that the plaintiff, who was the captain of a merchant vessel, went abroad in 1839, and that accounts, which were believed to be true, had been received of his death.

Reports having reached this country, of the death of the plaintiff abroad, the defendant obtained a rule nisi for postponing the trial; the attorney for the plaintiff having given notice that he did not mean to oppose the motion, the court made the rule absolute to postpone the trial until the court or a judge should direct it to proceed.

The learned Serjeant submitted, that although the attorney for the plaintiff would proceed to trial at his peril, yet if the verdict went against the defendant, the latter, should the report of the plaintiff's death be confirmed, could only take advantage of it by assigning error in fact; and that, at all events, he would be liable to a fresh action by the plaintiff's representatives. The court having granted the rule,

Channell Serjt., on a subsequent day, moved to make it absolute on an affidavit of service. He stated that the plaintiff's attorney had given the defendant notice that he did not mean to oppose the rule, there being

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were paid to her. The affidavit stated that she was a material and necessary witness, and had been examined at two previous trials of the same cause.

The learned Serjeant contended that the witness was bound to appear in court, and there state any objection she had to be examined before she received her expenses. [*Coltman* J. Ought you not in strictness to have tendered her a reasonable sum? She certainly made an unreasonable demand.] In *Edmonds* v. *Pearson* (*a*) it was held by *Gaselee* J. that a witness from the country, subpœnaed there without receiving sufficient for his expenses, and afterwards, when in *London*, subpœnaed by the plaintiff, and called by him at the trial, is bound to give his evidence both in chief and in cross-examination, and that he must seek to obtain his expenses, in some other way than by objecting to be examined. [*Maule* J. Your point is, that the witness being brought to *York*, was bound to appear in court.]

TINDAL C. J. The general right of a witness is, that he shall be paid, or be tendered, a reasonable sum for going to, staying at, and returning from, the place of trial. The party may waive this right if he thinks proper; and here, the witness must be presumed to have waived her right up to a certain point, by accompanying the plaintiffs to *York*, and living with them while there. Then comes the question, how she is to get back. All that is stated is, that she demanded a sum of 9*l.*, which may have been an unreasonable demand. I think, however, that there should have been a tender of a reasonable sum to convey her home; and that not having been done, I am of opinion that an attachment ought not to be granted against her.

(*a*) 3 *C.* & *P.* 113.

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BOSANQUET J. Assuming that the witness was not entitled to demand any thing for going to *York* and remaining there, I think that the plaintiffs were bound to tender her a reasonable sum to carry her back.

COLTMAN and MAULE JJ. concurred.

Rule refused.

Nov. 19.

NEWTON and Wife *v.* HARLAND and Another.

Where a party complains of an erroneous entry of the verdict on the postea, the proper course is to apply to the judge who tried the cause to amend the entry by his notes.

Where that course has been taken, and the judge has refused to make any order, the court will not interfere.

NEWTON moved for a rule calling upon the defendants to shew cause why the postea should not be amended, by rendering it conformable with the original indorsement of the verdict, made upon it by the associate. (*a*) [*Tindal* C. J. Should not this application have been to the judge who tried the cause?] Mr. Justice *Coltman* has already been applied to at chambers, but he has refused to make any order. The ground of the motion is, that after counsel on each side had been heard upon the subject at the close of the trial, and the associate had entered a general verdict for the plaintiffs by the direction of the learned judge, the entry was subsequently altered, behind the backs of the plaintiffs, and without their knowledge, under these circumstances the plaintiffs consider the alteration of the record as unwarranted, and they seek to have it restored to its original form.

TINDAL C. J. It appears to me that the answer to this application is, that the plaintiffs have come to the wrong tribunal. Where the verdict is incorrectly entered, the proper course is to apply to the judge who

(*a*) See *antè*, p. 670.

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tried the cause, in order that he may amend such entry, by making it conformable with his note of what took place at the trial. Here, that course has already been adopted: the plaintiffs have been before the learned judge, and he is satisfied that the order sought for should not be granted.

If, as is suggested, any one has been guilty of improperly altering a record, that of course would give rise to a different mode of proceeding.

BOSANQUET J. A party who conceives that he has a ground to complain of the manner in which a verdict is entered, must apply to the judge who tried the cause. The court never interfere unless the matter is referred to them by the judge. Here, it appears that the entry complained of, was made by the direction of my brother *Coltman*, who, after having heard the parties at chambers upon a summons, has refused to alter such entry.

MAULE J. The proper course, in order to correct any supposed error in the entering up of the verdict, is, to apply to the judge who presided at the trial. That course having been taken here, and the judge having disposed of the matter by refusing to make any order, the court have no authority to interfere.

COLTMAN J. After giving my opinion upon the subject at the close of the trial, I subsequently considered the matter, and thought the application of the defendants' counsel well founded. I thereupon directed the verdict to be entered as it now appears; and I have heard nothing to convince me that any injustice has been done to the parties by the alteration.

Rule refused.

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SMITH *v.* DAVIES.

Nov. 24.

CHANNELL Serjt. shewed cause against a rule for judgment as in case of a nonsuit, obtained by *Stephen* Serjt. The plaintiff's affidavit stated that he had been prevented from going to trial by the absence of a material witness; and that, since the commencement of the action, he had been informed that the defendant was in indigent circumstances, and that, after giving notice of trial, he had received a letter from the defendant's attorney stating that he expected to lose his costs in consequence of the inability of the defendant to pay them. The plaintiff now offers a stet processus; and unless the defendant will accept it, it is apprehended that the court will discharge the rule with costs: *Smith* v. *Badcock*. (*a*)

The court will not discharge a rule for judgment, as in case of a nonsuit, without a peremptory undertaking upon the ground of the insolvency of the defendant, unless it distinctly appears that the plaintiff first knew of the insolvency, after action brought, although the plaintiff offers to consent to a stet processus.

Stephen Serjt. *contrà*. The defendant is not bound to accept a stet processus, as it is not shewn by the plaintiff's affidavit, that he was not aware of the poverty of the defendant when the suit was commenced.

TINDAL C. J. It ought to appear distinctly, that the insolvency first became known to the plaintiff after the commencement of the action.

Rule discharged upon a peremptory undertaking. (*b*)

(*a*) 5 *Dowl. P. C.* 91. (*b*) *Vide antè*, 472. 555.

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Nov. 6. EDWARDS and Others, Assignees of WESTON, *v.* SCOTT and Another.

Whether a trader was, at the time of his bankruptcy, the reputed owner of particular property, is a question of fact, depending upon a consideration of all the circumstances attending the possession of such property.

Where, therefore, in trover, by the assignees of *A.*, a bankrupt, for a policy of insurance, the defendants pleaded, not guilty, and that the plaintiffs were not possessed as assignees; and at the trial it appeared, — that in 1836 the policy had been deposited by *A.* with the defendants, as a security for an advance of money; that in *March* 1837 *A.* became embarrassed, and a meeting was called of his creditors, at which a list of his debts was read aloud and handed round the room, which list contained a statement that the policy in question was deposited with the defendants as a security for 3000*l.*, from which sum 1200*l.*, the estimated value of the policy, was deducted, leaving the defendants creditors for the balance, 1800*l.*; that on the 15th of *July* 1837 (the *fiat* being granted on the 27th), an agent of the defendants called at the insurance office, and asked if the premium on the policy had been paid, at the same time stating that the policy had been deposited with the defendants; that the insurance company kept a book for the purpose of entering *written* notices of assignments and deposits of policies, which book contained no such entry with respect to the policy in question; and that the insurance office paid no regard to a verbal notice: it was held, that a direction — that the defendants had not got rid of the apparent ownership of *A.*, by what passed at the meeting of the creditors, and by the conversation at the office, not followed up by a notice *in writing*, — was wrong; it being a question for the jury, whether, under those circumstances, *A.* was the reputed owner of the policy at the time of his bankruptcy.

TROVER, for a policy of insurance, dated the 30th *October* 1818, and effected on the life of *Weston*, in the *London* Life Association Office, for 3000*l.*

Pleas: first, not guilty; secondly, that the plaintiffs were not possessed as assignees; on both of which pleas issue was joined.

At the trial before *Tindal* C. J., at the sittings in *London* after *Michaelmas* term 1838, it appeared that, in 1836, the policy in question had been deposited by *Weston* with a Mr. *Sinclair*, an agent of the defendants, as a security for the due fulfilment of a contract which he had entered into with the defendants, for the sale and delivery to them of two cargoes of timber, and on which they had advanced him 3000*l.*, but which contract had never been performed. The *fiat* against *Weston* was granted on the 27th *July* 1837. The secretary of the

insurance company, being called on the part of the plaintiffs, produced a book, kept at the office of the company, for the entry of notices of transfers and assignments of policies, but which contained no such entry with respect to the policy in dispute. On this evidence, the counsel for the plaintiffs contended, that they were entitled to recover, submitting, that as no regular notice had been given to the insurance company of any transfer of the policy to the defendants, it remained in the order and disposition of *Weston* at the time of his bankruptcy.

For the defendants, Mr. *Sinclair*, their agent, was called, who proved that, on the 15th *July* 1837, being the last day allowed for the payment of the premium on the policy, he went to the office of the insurance company, where he saw a Mr. *Rainbow* (the accountant, or clerk, who received the premiums), and inquired of him whether the premium on this policy had been paid; and, at the same time, in order to explain the reason of the inquiry, he informed Mr. *Rainbow* that the policy was in his possession as the agent of the defendants, with whom it had been deposited by *Weston* as a security for a large sum of money advanced by them to him. Mr. *Rainbow*, thereupon, referring to a book, told the witness that the premium had been paid. The witness also stated, that *Weston*'s affairs having become deranged in *March* 1837, he attended a meeting of his creditors on the 10th of that month, when an account was produced by his attorney of the amount of his debts. In the list, the defendants appeared as creditors for 3000*l.*; from which, 1200*l.*, the estimated value of the policy, was deducted, leaving a balance of 1800*l.* as the sum due to them from *Weston*. This account was read aloud, and was also handed about the room. Upon this evidence it was submitted, on the part of the defendants, that the policy was not in the order and disposition of *Weston* at the time of his bankruptcy, and that if

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not. The policy had been deposited with the defendants as a security for the performance of a contract which the bankrupt never fulfilled; but the latter continued to pay the premiums down to the bankruptcy, and the relations between him and the company remained wholly unaltered, not being in the least affected by the conversation which took place between the agent of the defendants and the accountant of the company. In *Williams* v. *Thorpe* (*a*), it was held by the Vice-Chancellor, that the assignment of a policy, without notice to the insurers, did not take the policy out of the order and disposition of the bankrupt. That was a much stronger case than the present; for there it appeared that the Equitable Assurance Company had no book wherein to enter assignments of policies; whereas here, a regular book is kept for that purpose. *Williams* v. *Thorpe* was approved of in a recent case of *Duncan* v. *Chamberlain* (*b*). The same doctrine was laid down in *Ex parte Colvill* (*c*), and, on an appeal from the judgment of the Vice-Chancellor, in *Ex parte Tennyson* (*d*). The foregoing cases undoubtedly do not decide *what* notice is necessary; but that point was considered and decided in *Ex parte Carbis* (*e*), which is precisely similar to the present case. There, a party to whom the bankrupt had assigned a policy of assurance, sent an agent to the office for the purpose of paying the annual premium, who, in the course of conversation with one of the clerks, told him that the policy had been so assigned. It was held, that this conversation was not sufficient notice to the insurance office. In *Ex parte Watkins* (*g*), reversing the judgment of the court of Review (*h*), the Lords Commissioners held that, where shares of a company stood in the name of a

(*a*) 2 *Simons*, 257.
(*b*) Not yet reported.
(*c*) *Montague*, 110.
(*d*) *Montague & Bligh*, 67.
(*e*) 4 *Dea. & C.* 354.
(*g*) 2 *Mont. & Ayrton*, 348.
(*h*) 1 *Mont. & Ayrton*, 697.

effect is to be given to what passed there, it was disposed of by the verdict of the jury.

Greenwood (*Platt* was with him) in support of the rule. This question depends entirely upon the seventy-second section of the 6 *G.* 4. *c.* 16., the bankrupt act; for an assignment of a chose in action is perfectly good in equity without notice; *Brown* v. *Heathcote.* (*a*) The point is, whether this policy was in the possession, order, or disposition, of the bankrupt, as reputed owner, on the 27th of *July* 1837, the time of the bankruptcy; and that was a simple question of fact for the jury. An endeavour was made at the trial to dispose of the case, by citing many of the decisions in equity which have been referred to in the course of the present argument. Those decisions are not in point; for the rule laid down in those cases, goes to this extent only, that where the sole thing which takes place is, the simple assignment of a chose in action, there is no change of reputed ownership, without notice to the debtor. Here, the transfer of the policy to the defendants was notorious; a paper, containing an account of the transaction, was handed round the room, at a meeting of the bankrupt's creditors; and in addition to that, the agent of the defendants called at the insurance office, and informed the accountant of the company, that the policy had been deposited with the defendants as a security for an advance of a large sum of money. It was for the jury upon that evidence, to say, whether the bankrupt still remained the reputed owner of the policy; but they were directed by the Lord Chief Justice to find, as a necessary inference, that because no notice in writing had been given to the office, the defendants had not got rid of the apparent ownership of the bankrupt. It is submitted that the summing up of his lordship amounts

(*a*) 1 *Atk.* 160.

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the bankrupt shall be considered the reputed owner, unless the muniments or evidence of title shall have been handed over. In *Jones* v. *Gibbons* (*a*) Sir *William Grant*, Master of the Rolls, seems to doubt whether, after an assignment and delivery of the security to the assignee, the bankrupt can be said to have the order and disposition of a chose in action, merely because there has been no notice to the debtor. Even assuming the rule, as it is laid down in *Ex parte Monro*, and the other cases which have been cited, to be correct, and to be applicable to the present case, it has been frequently held, that reputed ownership is a question for the jury. In *Walker* v. *Burnell* (*b*), *Buller* J. says, "questions of this kind have much more of fact than of law in them;" and that observation is cited, with approbation, by *Eyre* C. J. in *Lingham* v. *Biggs* (*c*), and by *Lawrence* J. in *Horn* v. *Baker* (*d*), who adds, "and therefore it seems more proper, in such cases, to leave it to the jury to say, whether, under the circumstances, the bankrupt had the reputed ownership of the goods at the time." In *Watson* v. *Peache* (*e*), *Tindal* C. J. says, "I left it to the jury to say, whether, in the coal trade of *London*, there was any general custom for merchants to carry on their business in hired barges bearing the name of the hirer." The principle of that case applies to this; it is notorious that policies are constantly handed over to other parties for advances made; and although it may be, in some respects, a convenient rule, to require a notice, *in writing*, to be given to the insurance office, an individual requiring an advance for a few weeks would not be likely to consent to such a notice being given. *Kirkley* v. *Hodgson* (*g*) is the converse of this case: it was there

(*a*) 9 *Ves.* 410.
(*b*) 1 *Dougl.* 317.
(*c*) 1 *Bos. & P.* 89.
(*d*) 9 *East.* 241.
(*e*) 1 *New Cases*, 335.
(*g*) 1 *B. & C.* 588.; 2 *D. & R.* 848.

defendants' agent of the rule of the office. For the agent did all that a party could reasonably be expected to do, who was unacquainted with the regulations of the office; which regulations there were no means of ascertaining except from some person connected with the company, inasmuch as the policy itself was silent on the subject. But *Ex parte Masterman* (*a*) shews clearly, that non-compliance with the rules of the office, is not material. There it was held, that if the owner of shares in an insurance company, assigns them by way of mortgage, and notice is given (*b*) to the company, but owing to an informality in the assignment, the company do not recognise the mortgagee's title, and the shares still stand in the mortgagor's name, the shares are not in the reputed ownership of the latter. (*c*) Great reliance has been placed on *Ex parte Watkins* (*d*): but there, the facts which were before the court of Review, do not seem to have been fully before the Lords Commissioners, when they reversed the judgment of that court; and at any rate, it is distinguishable, in many respects, from the present case. Each case must depend on its own circumstances; and it is for the jury to say, who is the reputed owner of the property in dispute. Looking, in this case, at what passed at the meeting of the creditors, the transaction was notorious; and notoriety is the question which is in issue. And where, as here, there is a valid transfer of the chose

(*a*) 2 *Mont. & Ayrton*, 209.

(*b*) In *Ex parte Masterman* the notice of the assignment was given, as usual, by the *mortgagees* of the shares, and not, as stated in the marginal note, by the *mortgagor*.

(*c*) He would not be in possession "with the consent and permission of the true owner thereof," unless the informality of the assignment could be admitted as evidence of consent and permission on the part of the mortgagee. And *quære*, whether, in the principal case, the evidence of *Sinclair* did not negative consent and permission, and thereby establish a defence which may be considered to be independent of the question of reputed ownership.

(*d*) 2 *Mont. & Ayrton*, 348. 1 *Mont. & Ayrton*, 697.

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in action, the onus lies, not on the defendants, but on the plaintiffs, to shew that the bankrupt continued to be the reputed owner. That notoriety is the invariable test, appears from *Muller* v. *Moss.* (*a*) *Buck* and *Lee* (*b*), and *Dean* v. *James* (*c*), merely decide the same point which has been ruled in the cases in equity,—that assignment alone is not sufficient to disprove reputed ownership. It is clear that the replications in those cases would have been good, if they had stated that the assignments were notorious to the world. No decision has gone to the extent of saying that there must of necessity be notice to the debtor, in order to make a transfer good, as against the assignees of a bankrupt. It is clear, on a review of all the authorities, that reputed ownership is a question for the jury; and in this case, that question should have been left to them, unfettered by the direction given by the Lord Chief Justice.

TINDAL C. J. After the arguments I have heard, and the cases that have been cited, I am of opinion that the question was left to the jury in too limited a form; and that what should have been put to them as a matter of observation, was left to them rather as matter of law. Instead of its being laid down to them as positive law, that the defendants had not got rid of the apparent ownership of the bankrupt without giving notice in writing to the insurance company, it should have been put to them to say, whether that which passed at the meeting of the creditors, coupled with the conversation of the defendants' agent with the accountant of the company, satisfied them that the policy was not in the reputed ownership of the bankrupt at the time of his bankruptcy. I am not satisfied with the finding of

(*a*) 1 *M.* & *S.* 335.
(*b*) 1 *Ad.* & *Ell.* 804.; 3 *Nev.* & *M.* 580.
(*c*) 1 *Nev.* & *M.* 392.; 1 *Ad.* & *Ell.* 809 *n.*

the jury, upon the direction given; and I therefore think that there ought to be a new trial.

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The rest of the court concurred.

Rule absolute for a new trial; the plaintiffs to have the costs of the first trial, if they succeed on the second. (*a*)

(*a*) And see *Burn* v. *Carvalho*, 1 *Ad. & El.* 883.; 4 *Nev. & Mann.* 889.

PEARSALL and Wife to PEARSALL.

Nov. 24.

The affidavit verifying the certificate of an acknowledgment by a married woman residing in *Germany* of a conveyance, under the act for the abolition of fines and recoveries, 3 & 4 *W.* 4. *c.* 74. *s.* 85., may be made by notary public.

WILDE S. G. moved that the acknowledgment of a certain deed of release, mentioned in the following documents, might be inrolled, pursuant to the act for the abolition of fines and recoveries.

The first document was an appointment by *Erskine* J. of Sir *Samuel Stirling*, of &c., *Richard Hereford*, of &c., *Richard Master*, of &c., and *Carl Kerler*, of *Carlsruhe*, in the grand duchy of *Baden*, in *Germany*, notary public, or any two of them, as special commissioners to take the acknowledgment of *Harriet Eliza*, the wife of *Robert Lucas Pearsall*, then residing at *Carlsruhe* aforesaid, Esq., of certain deeds of lease and release, by which it was intended to bar the dower of the said *Harriet Eliza*.

The next document was a certificate by Sir *Samuel Stirling* and *Richard Master*, in the form prescribed by 3 & 4 *W.* 4. *c.* 7. *s.* 84., of the execution of the commission.

Then followed an affidavit by "*William Haas*, of *Carlsruhe*, in the grand duchy of *Baden*, in *Germany*, sworn interpreter of the *English* language attached to the municipal jurisdiction of *Carlsruhe* aforesaid, and

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The Solicitor General said that he was instructed to state to the court, though he had no affidavit in support of such statement, that *Carl Kerler*, the third commissioner, is the head of the department from whom all the notaries of the grand duchy derive their powers, and that it is his official seal which is affixed to the affidavits, and that *Kerler* had declined to act as commissioner to make the affidavit, under an impression that it would be improper for him to make an affidavit which was to be verified by an officer deriving authority from himself.

The statute for the abolition of fines and recoveries requires (*s.* 85.), that every certificate of the taking of an acknowledgment by a married woman of any such deed (*a*), together with an affidavit of some person verifying the same, and the signature of the party by whom the same shall purport to be signed, shall be lodged with an officer of the court of Common Pleas. The rule of this court of *H. T.* 4 *W.* 4. (*b*), which requires the affidavit verifying the certificate to be made by a practising attorney or solicitor, contains an express exception of cases where the acknowledgment is taken "elsewhere then in *England*, *Wales*, or *Berwick-upon-Tweed*." Here, the affidavit is made by a notary, a person of the same position in *Germany* as an attorney in *England*, and that notary not himself a commissioner, which relieves the case from any such question as was raised in *Scholfield, in re.* (*c*)

TINDAL C. J. I see no objection to the affidavit verifying the certificate.

Rule granted. (*d*)

(*a*) "Any deed by which any disposition, release, surrender, or extinguishment shall be made by her under that act." *s.* 80.

(*b*) 10 *Bingh.* 459.

(*c*) 3 *New Cases*, 293.

(*d*) And see *Seton* v. *Sinclair*, 2 *W. Bla.* 880. 5 *Cruise Dig.* (ed. 1835) 112.; *Hands on Fines and Recoveries*, (ed. 1817,) 123. 244. 333.

der, arbitrament, and final determination, of the said arbitrators or any two of them, of and concerning the premises, so as the said award of the said arbitrators, or any two of them, were made in writing, under their hands, or the hands of any two of them, ready to be delivered &c. on or before the 17th day of *March* 1840, or on or before such further day or days as the said arbitrators, or any two of them, should, in manner therein mentioned, appoint; seven days' notice to be given of the first meeting; with power to adjourn and, in case of nonattendance, to proceed *ex parte*; the costs of the cause, including those of the special jury, to abide the event of the award, provided the said arbitrators or two of them should certify that the cause was fit and proper to be tried by a special jury; the costs of the award and reference, to be in the discretion of the said arbitrators, or any two of them.

In *Hilary* term last the agreement of reference was made a rule of court, upon the motion of *Bompas* Serjt. on the part of the defendant (*a*). The time for making the award having been enlarged until the last day of the present *Michaelmas* term, the two first named arbitrators made an award on the 21st of *July* last, whereby they found that the plaintiff had a good cause of action against the defendant in respect of the demands in declaration set forth, and that the pleas of the defendant had not been proved; and they assessed the damages in the action at 827*l.* 3*s.* 5*d.*, and awarded the said damages to be paid by the defendant to the plaintiff in respect of such action, and they thereby certified that the

(*a*) The articles of agreement contained no clause for making the submission a rule of court. The motion seems to have been founded upon the circumstance of the reference, though by private agreement, being on a cause pending in court. As to what agreements may be made rules of court, see *Steers* v. *Harrop*, 1 *Bingh.* 133., 7 *B. Moore*, 466.

1840.

LITTLE v. NEWTON.

Wilde Solicitor-General, in the early part of the term moved for a rule calling upon the defendant to shew cause why the master should not be ordered to tax their costs. In *Hobdell* v. *Miller* the reference was by an order of *nisi prius*, with a nominal verdict entered for the plaintiff. Here, the reference is made by an agreement between the parties only. The costs, though taxed by the officer of the court, constitute in effect a sum of money payable under the award. The cases shew that it was the duty of the *defendant* to cause the costs to be taxed; *Chandler* v. *Fuller* (*a*), *Fox* v. *Smith* (*b*), *Bigland* v. *Skelton* (*c*); and he had no right to delay the taxation until after the time at which he would be allowed to move to set aside the award (*d*), and thereby postpone the

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posed bearing upon *Little* v. *Newton*. Neither of these cases was founded upon the statute of 9 & 10 *W.* 3. *c.* 15., and where the reference is under the general authority of the court at common law, there is no time absolutely fixed for moving to set aside the award, though it is usually required that the application be made within the statutable period.

(*a*) *Willes*, 62.

(*b*) 2 *Wilson*, 267.

(*c*) 12 *East*, 436.

(*d*) In *Chandler* v. *Fuller*, *Fox* v. *Smith*, and *Bigland* v. *Skelton*, the rule is laid down, without qualification, that it is incumbent on *the defendant* to cause the costs to be taxed. It is observable, however, that in each of those cases the action was on the submission bond, and the defendant, in order to relieve himself from the penalty, was bound to shew that he had strictly complied with the terms of the condition, introduced for his benefit, as far as it was possible for him to do. The term "the defendant," in those cases, does not mean the defendant in the action referred, but the defendant in the action brought for the non-performance of the award; and in cross actions upon bonds of submission, it might be, that each bond was forfeited for the non-performance of an act which, by the award, had been left open to be done by either party indifferently. Where the action, or other proceeding, is upon articles of agreement, which either party may enforce, there seems to be no reason why the party who was defendant in a cause which forms the whole or part of the subject matter referred, should be bound to bring his adversary's costs before the master for taxation.

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BAIRD *against* ROBERTSON.

Nov. 4.

A dispute having arisen as to whether the plaintiff was entitled, in respect of 200 shares, to be registered as a shareholder in a railway company, it was arranged, between him and the company, that he should deposit 400*l.* on account of such shares with the defendant, who was at that

ASSUMPSIT, for money had and received by the defendant for the use of the plaintiff, for interest, and upon an account stated.

Pleas: first, non assumpsit; secondly, as to 400*l.* parcel &c., that the defendant, before the commencement of the suit, to wit, on &c. at the request of the plaintiff, paid to the Eastern Counties Railway Company, the sum of 400*l.* for the plaintiff; and that the said payment was so made as aforesaid as, and it was then agreed between and by the plaintiff and the defendant respectively, that such payment should be considered to be, and the same was then accepted by the plaintiff, in full satisfaction and discharge of the said sum of 400*l.*, parcel, &c. in the introductory part of that plea mentioned, and of all damages and cause of action in respect thereof. Verification.

time the secretary of the company, which sum was to be repaid if the plaintiff failed to make out his claim. The following minute of the transaction was made by the defendant: —

"26th *April* 1838, E. C. R. Company. Memorandum.—Mr. *J. B.* has deposited with me the sum of 400*l.* on account of 200 shares, for which he claims to be registered, on condition that Mr. *B.* is to accept back the money so deposited if he cannot substantiate, to the satisfaction of the board of directors, his claim to be registered for the same." (Signed) "*J. C. R.*, secretary."

The 400*l.* being paid to the defendant in a cheque, the defendant paid it into his bankers, on his private account. The defendant quitted the employment of the company in *February* 1839. The plaintiff never was registered in the books of the company, as a shareholder:

Held, first, that the action, which was an action of assumpsit for money had and received, and which was not commenced until more than two years after the money was so deposited, was rightly brought against the defendant; and, secondly, that the plaintiff was entitled to recover the 400*l.* without shewing that he ever attempted to substantiate his claim to be registered as a shareholder.

Semble, that the plaintiff might have immediately abandoned his claim to be registered, and have sued for the money.

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"26th *April* 1838, E. C. R. Company. Memorandum. — Mr. *James Baird* has deposited with me the sum of 400*l.* on account of 200 shares, for which he claims to be registered, on condition that Mr. *Baird* is to accept back the money so deposited, if he cannot substantiate, to the satisfaction of the board of directors, his claim to be registered for the same.

"(Signed) *J. C. Robertson*, Sec^y."

At the time that this memorandum was made, a cheque for the 400*l.* was handed to the defendant, who paid it into his bankers, where it was carried to his private account.

The defendant left the employment of the company in *February* 1839, and towards the close of that year a Mr. *Johnson*, an accountant, was called in to investigate its affairs. In *December* Mr. *Johnson* wrote to the defendant, for information on several matters connected with his late employment as secretary to the company. The defendant's reply, dated the 24th of *December* 1839, contained the following passage. "To your second enquiry, by which I am asked to state, — whether any money has been paid to me on any account whatever, either in trust or otherwise, for the company, that has not been entered in their books, — I have to say, in answer, that to the best of my recollection, knowledge, and belief, the only sum, falling under this description, is one of 400*l.* which was deposited with me by a person whose name I forget, on account of a Mr. *Baird*, as in trust for him on the one part, and the company on the other, to abide a certain event, which is stated, I believe, distinctly enough, in a memorandum signed by Mr. *Baird*'s agent and myself, and filed among the company's papers. If you will send me a copy of that memorandum, — for I have not one myself, — and there is any thing which it leaves unexplained, I shall gladly supply the defect."

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whether the event had happened which entitled the plaintiff to maintain an action at all. With respect to the first point, it is evident from the defendant's letter, that he considered that he was liable to account to the company for the 400*l.*; for he supplied the information which he gave respecting it, in answer to an inquiry as to whether any money had been paid to him "either in trust or otherwise, for the company, which had not been entered in their books." There can be no doubt that the company would have been entitled to recover this money from the defendant. The memorandum, made at the time, shews clearly that the 400*l.* were not deposited with him in his individual character; for it is headed "E. C. R. Company," and the defendant signs it, expressly, in his capacity of secretary.

Secondly, supposing the defendant to have been a stakeholder, there was no evidence that the contingency had happened on which the money was to be returned to the plaintiff. [*Tindal* C. J. I think that there was some evidence that it had happened. The present secretary proved that the plaintiff was not registered for any shares. After a lapse of two years, it is to be presumed that the plaintiff never substantiated to the satisfaction of the directors his claim to be registered as a shareholder in the company. Surely a period of two years is a sufficiently long interval. What is to become of this money? The defendant is no longer in the employment of the company. *Maule* J. The condition on which the money was deposited with the defendant, was in the plaintiff's favour—he had a right to abandon it the next day if he thought that he could not establish his claim to be registered. *Bosanquet* J. When the plaintiff demands the money, does he not abandon that claim?] In *Wilkinson* v. *Godefroy* (*a*) the plaintiff agreed

(*a*) 9 *A. & E.* 536.

1840.

FERGUSON and Others, Assignees of the Estate and Effects of FREDERICK WILLIAM HAYES and HENRY SHAW, Bankrupts, *v.* WILLIAM SPENCER and JAMES SPENCER.

Nov. 25.

ASSUMPSIT, for goods sold and delivered, money lent, and money paid by, and for interest payable to, and upon an account stated with, the bankrupts before their bankruptcy, and upon an account stated with the plaintiffs, as assignees.

Pleas: first, non assumpsit; secondly, that the sum of 1000*l.* in the last count of the declaration mentioned, was money which was due and owing from the defendants to *Hayes* and *Shaw* before and at the time of *Hayes* and *Shaw* becoming bankrupts, and that *Hayes* and *Shaw*, before and at the time of their becoming bankrupts, were indebted to the defendants in 1000*l.* for the price and value of goods by the defendants before that time sold and delivered to *Hayes* and *Shaw* at their request, and in 1000*l.* for interest upon the forbearance, &c.; and in 1000*l.* for money due and owing from *Hayes* and *Shaw* to the defendants, upon an account stated between them before *Hayes* and *Shaw* became bankrupts; which moneys exceed, &c.

The replication joined issue upon the first plea, and took issue upon the second; upon which issue was also joined.

At the trial before *Tindal* C. J., at the sittings after *Michaelmas* term, 1838, the following facts appeared: —

Under the *Irish* Bankrupt Act, 6 & 7 *W.* 4. *c.* 14., the right of suing in an *English* court upon a contract made by the bankrupts in *England* with a person resident in *England*, passes to the assignees under an *Irish* commission of bankrupt.

A trader who has obtained his certificate under a commission of bankrupt issued against him in *Ireland*, under the provisions of 6 & 7 *W.* 4. *c.* 14. is a competent witness to support an action brought in *England* by his assignees, for a debt alleged to have been due to him before his bankruptcy.

So, to negative a set-off upon a debt alleged to have been due from the witness to the defendant before the witness became bankrupt.

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In *Hilary* term, 1839, *Kelly* moved for a rule to shew cause, why a nonsuit should not be entered, on the point reserved, or why a new trial should not be had, on the ground that evidence had been improperly received.

Upon the first point he submitted that the assignees, under an *Irish* commission, who derive their whole power from the *Irish* statute of bankruptcy, cannot sue for a debt accruing altogether in *England* against *English* subjects residing in *England*. The *Irish* statute of 6 & 7 *W.* 4. *c.* 14. repeals all the prior acts of parliament relating to bankrupts in *Ireland*, and constitutes the entire bankrupt law of that country. In many of its provisions it very closely resembles the *English* statute of bankruptcy (*a*); but the only clause which transfers the personal property of bankrupts to their assignees, and the right to sue for debts due to the bankrupt's estates, is the seventy-fourth section, which is in the following terms: —

" And be it further enacted, that when any person hath been adjudged a bankrupt, all the present and future estate of such bankrupt, *wheresoever the same may be found or known*, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed, or come to him before he shall have obtained his certificate, *and all debts due, or to be due, to the bankrupt, wheresoever the same may be found or known*, shall become absolutely vested in and transferred to the assignee or assignees for the time being, whether appointed by the commissioner, or chosen by the creditors, as hereinbefore provided, for the benefit of the creditors of the bankrupt, by virtue of such appointment or choice as aforesaid; and the property, right, and interest in such debts, shall become vested in, and transferred to, such assignees for the time being, as fully as if the assurance whereby they are secured had been made to

(*a*) 6 *G.* 4. *c.* 16.

equally a maxim of the law of *Ireland*.] The provision of 6 & 7 *W.* 4. *c.* 14., which is a very recent act, is, that it shall not extend either to *England* or *Scotland*, except where the same are expressly named. [*Bosanquet* J. The *English* act has the same provision — that this act shall not extend to *Ireland* or *Scotland*.] A debt is a chose in action, which cannot be transferred from one person to another except under the provisions of a statute. Whatever interest, therefore, the assignees under an *Irish* commission may acquire in debts, or any other portion of the personal estate of the bankrupt, a right to sue for a debt due to the bankrupt cannot vest in the assignees unless that right be given to them by statute. The seventy-fourth section of the *Irish* statute relates to personal estate only; but by the seventy-sixth section the real estate of the bankrupt is vested in the assignees. By that section it is enacted, "that all lands, tenements, and hereditaments (except copyhold or customaryhold) in *England*, *Scotland*, or *Ireland*, or any of the dominions, plantations, colonies, belonging to His Majesty, to which any bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands, tenements, and hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations, or colonies, have disposed, and all such lands, tenements, and hereditaments, as he shall purchase, or shall descend, be defeased (*a*), revert, or come to such bankrupt before he shall have obtained his certificate, and all deeds, papers, and writings respecting the same, shall vest in the assignee or assignees, for the time being, of such bankrupt, whether appointed by the commissioner, or chosen by the creditors of the bankrupt, as hereinbefore

(*a*) Lands, &c., which shall "be defeased to such bankrupt," would appear to be lands upon which the bankrupt has a right of entry in respect of a condition broken.

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sanquet J. The public stocks are charged on the consolidated fund — on the revenues of the country. It is thought necessary in every stock act to insert a clause making them personal property.] The stocks and funds being made personal property by the statute under which they are created, would pass as personal property. The ninety-fourth section appears, therefore, to be useless if all personal property passed by the seventy-fourth. In *Jeffery* v. *M'Taggart* (*a*) it was held that a trustee under the *Scotch* Bankrupt Act (*b*) cannot sue in his own name for a chose in action. In that case *Jeffery*, as trustee of the sequestered estate of *Mackenzie*, a bankrupt in *Scotland*, brought an action against the defendant, a merchant in *London*, to recover the balance of an account owing to the bankrupt's estate. At the trial, before Lord *Ellenborough*, it was objected that the 54 *G.* 3. *c.* 137., upon which the plaintiff's authority was founded, did not enable him to sue for this balance, it being a mere chose in action; and the plaintiff was nonsuited. Upon a motion to set aside this nonsuit, Lord *Ellenborough* says, "I cannot find any words conveying to the plaintiff a right of suit. The utmost extent to which the language of the act can be carried, is to a right of property. The act contains no expressions large enough to convey the right contended for. I take it for granted that the framer of the act was aware of the law of *England* touching the assignment of a chose in action. I cannot, therefore, suppose the legislature had a larger object in view than what they have accomplished." In the absence of any case under the *Irish* Bankruptcy Act, the question rests entirely upon the case of *Jeffery* v. *M'Taggart* as far as it goes, and upon the very terms of the *Irish* act. [*Tindal* C. J. To be consistent, it must be contended that assignees under an *English* commission could not sue an *Irishman*

(*a*) 6 *Mau. & Selw.* 126. (*b*) 54 *G.* 3. *c.* 137.

Then, the bankrupt, *Hayes*, not being exonerated from any action which might be brought against him in respect of the cross demand admitted to be due from the bankrupts to the defendants, he had a direct interest in increasing the personal estate by the money sought to be recovered in this action.

A rule *nisi* having been granted to enter a nonsuit, or for a new trial,

Wilde S. G. and *Manning* Serjt. early in this term shewed cause. The defendants are not entitled to a nonsuit, because the last *Irish* Bankrupt Act of 6 & 7 *W.* 4. *c.* 14. *s.* 74. authorizes assignees under an *Irish* commission, to sue in the courts of this country, for debts accruing here. The provision for vesting in the assignees the personal property and the credits or active debts of the bankrupt, in the *English* statute of 6 *G.* 4. *c.* 16. *s.* 135. is precisely the same as that in the *Irish* statute of 6 & 7 *W.* 4. *c.* 14. *s.* 74. The words in each are, "wheresoever the same shall be found or known." So, the *English* act contains, sect. 135., an exclusion of *Ireland* and *Scotland*, precisely corresponding with the exclusion of *England* and *Scotland* in 6 & 7 *W.* 4. *c.* 14. *s.* 161. Any construction, therefore, put by the *Irish* courts upon the exclusion of *Ireland* in the *English* Act, will be directly in point in considering the construction which ought to be put upon the exclusion of *England* in the *Irish* Act. Now the case of *Tronson* v. *Callan* (*a*) expressly decides, that debts contracted in *Ireland* vest in the assignees under an *English* commission by the 63d section of the *English* statute. The *Irish* statute, therefore, in using the same words which had been before inserted in the *English* statute, gave to the *Irish* assignees, not only the property in debts due to the bankrupts from persons resident in *England* upon con-

(*a*) 1 *Hudson & Brooke*, 113, 114.

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The objection to the competency of *Hayes* as a witness for the plaintiffs, rests upon the assumption that the debt due from the bankrupts to the defendants which accrued in *England*, is not barred, as against *Hayes*, by the certificate by him under the *Irish* commission. However this may have been under a commission founded upon an act of the *Irish* legislature only before the Union, the statute of 6 & 7 *W.* 4. *c.* 14., being an act of the Imperial legislature, any effect given to a certificate by that statute, must bind *England* as well as *Ireland*. Before the Union, *Ireland* was considered, for many purposes, as a foreign country; and it might be questionable, whether an *Irish* certificate barred an *English* debt; *Smith* v. *Buchanan* (*a*), *Shallcross* v. *Dysart*. (*b*) But all doubt as to the effect of an *Irish* certificate, obtained under a statute passed since the Union, is now set at rest, by the decision of the court of Exchequer in *Ireland*, in *Rogers* v. *Love* (*c*), in which it was held, that an *Irish* debt was discharged by a certificate obtained under an *English* commission; thereby giving the same effect in *Ireland* to the *English* Bankrupt Act of 6 *G.* 4. *c.* 16. as the plaintiffs now contend ought to be given to the *Irish* Bankrupt Act of 6 & 7 *W.* 4. *c.* 14. The cases are precisely similar; and the court cannot decide in favour of the defendants' objection without directly overruling the case of *Rogers* v. *Love*. In *The Royal Bank of Scotland* v. *Cuthbert* (*d*), it was held that *Scotch* property passed under an *English* commission, and that the *English* certificate barred a debt contracted by the bankrupt in *Scotland*. So, a *Scotch* discharge is available in *England*, because it is under an act of the Imperial legislature. In *Lewis* v. *Owen* the debt was held not to be discharged by the *Irish* certificate, because it was not shewn that the

(*a*) 1 *East*, 6.
(*b*) 2 *Glyn. & Jam.* 87.
(*c*) 1 *Hudson & Brooke*, 484.
(*d*) 1 *Rose*, 486.

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for the defendants; the first and principal question, whether the assignees under an *Irish* commission, can sue here for a debt contracted in *England;* which objection, if allowed, would go to a nonsuit. The second, as to the admissibility of a witness called by the plaintiffs; which latter objection goes to a new trial only.

As to the first objection, it is contended on the part of the defendants, that as the 161st section of the *Irish* Bankrupt Act has expressly enacted, "that the statute shall not extend either to *England* or *Scotland*, except where the same are expressly mentioned," although the real estate of the bankrupt in *England* will vest in the *Irish* assignees under the seventy-sixth section of the act, by reason of the mention of *England* in that section; yet that neither the personal estate of the bankrupt in *England* nor debts due to the bankrupt from persons in *England*, can vest in such assignees under the seventy-fourth section, by reason of the omission of any mention of *England* in the latter section. That *the personal estate* of the bankrupt, however, was intended to vest and does actually vest in the assignees, notwithstanding such omission in the seventy-fourth section, is apparent from the forty-first section of the statute, which gives authority to the messenger to break open any house, &c. in *England*, where any property of such bankrupt is reputed to be, and to seize the same (under the precautions which are prescribed by that section); and as the words of the seventy-fourth section, which describe the personal estate of the bankrupt and the debts of the bankrupt which shall vest in the assignees are precisely the same as to both, and also as general as possible, viz. "wheresoever the same may be found or known," we think the just inference is, that the clause in question will no more operate to prevent *the debts in England* from vesting in the assignees, than they do the personal estate; the more especially when it is considered, that debts due to

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precisely similar in effect to those contained respectively in the 74th and 76th sections of the *Irish* statute. The case, indeed, is exactly parallel with the present in its circumstances.

In that case the court of King's Bench in *Ireland* held, that notwithstanding the restrictive clause, the debts in *Ireland* due to the bankrupt vested in the assignees under the *English* commission. It is impossible to express the law more clearly or more accurately than in the language of L. C. J. *Bushe*. "The meaning of this clause (section 135) appears to us to be, just this, and no more, that the subsisting code of the *Irish* bankrupt laws shall not be altered or affected by this act, unless when it is declared in express terms so to be. By the construction contended for on the part of the plaintiff, the whole policy of the act would be perverted. It is admitted, that the real property in *Ireland* passed to the assignee of the bankrupt in *England;* and so also with respect to chattels; and the messenger is empowered to take possession of them, and to break open houses &c. in *Ireland* for this purpose: but it is said, that debts in *Ireland* are not included, although the words in the sixty-third section are so extensive as these, 'and the commissioners shall also assign as aforesaid all debts due to the bankrupt, wheresoever the same may be found or known.' It seems quite unreasonable to give to these words a construction, the operation of which would be, to defeat a principal object of the act."

The case of *Rogers* v. *Love*, decided in the *Irish* court of Exchequer, in the year following (1828), is to the same effect. "The defendant traded in *Ireland* and *England*, and became indebted to persons residing in *England*, who issued a commission of bankrupt against him under the 6 *G.* 4. *c.* 16.; he was also indebted to the plaintiff at the date of the issuing of the

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See FRAUDS, STATUTE OF, 2.

ACCOUNT.

1. Cannot be stated by an infant. Page 551

ACKNOWLEDGMENT BY MARRIED WOMAN OF HER CONVEYANCE BY DEED.

I. *Affidavit, before whom to be made.*

1. The affidavit verifying the commissioner's certificate of the acknowledgment by a married woman residing in *Germany* of a conveyance under the seventy-fifth section of 3 & 4 *W.* 4. *c.* 74., for the abolition of fines and recoveries, may be sworn before a notary public. *Pearsall to Pearsall.* Page 973

ACTS DONE.

To be pleaded according to their legal effect, whether such acts are in writing or not. 281. (*d*).

ADMINISTRATION.

See MONEY BROUGHT INTO COURT, 3.

NEW TRIAL, 3, 4.

present when the boundary was staked out by the referee. *Taylor* v. *Parry.* Page 604

AMBIGUOUS EXPRESSIONS.

CONSTRUCTION OF, 732. (*a*).

AMENDMENT.

See JUDGMENT, 2.

I. *What defects amendable.*

And see COSTS, 11.
PLEADING, 20.

1. Copy of issue delivered, varying from the roll in date of year, and also in blanks being left therein for the teste and return of the writ of trial, amended upon payment of costs. *Watts* v. *Ball.* 208

2. Where, in a declaration, the defendant was described as the secretary of a public company, and a cause of action against the company was set forth, the court, after verdict for the plaintiff, refused to allow an amendment in the declaration, by inserting, that the company were trading under letters patent of Her Majesty, empowering them to sue and be sued in the name of one of the two public officers to be appointed by them for that purpose, and that the defendant was one of such officers, duly appointed to sue and be sued, for and on behalf of the company, and duly registered as such officer pursuant to 7 *W.* 4. & 1 *Vict. c.* 73., except upon the terms of the plaintiff's paying the costs of the motion, and of a motion in arrest of judgment, and of foregoing the costs of the trial. *Galloway and Another* v. *Bleaden.* Page 247

3. In replevin against the assignee of the reversion of part of the premises demised, the defendant may avow at common law, stating the facts specially, and leaving the apportionment of the rent to be made by the jury, or he may avow in the general form given by 11 *G.* 2. *c.* 19. *s.* 22. as upon a holding at a certain rent. If he avow, under the statute, for the entire rent, or with a deduction from the entire rent greater or less than the proportion properly belonging to his interest in the reversion, the judge at nisi prius may direct the avowry to be amended, either by converting it into an avowry at common law, or, leaving it as an avowry under the statute, by describing the rent in conformity with the proportionate value of the respective parts, into which the reversion has been divided. *Roberts* v. *Snell.* 577

4. *Semble*, that the judge, or the court, substituted, by consent of parties, for the judge at nisi prius, may make such amendment, although first prayed for after the verdict is delivered, and before it is recorded. *Ibid.*

II. *At what time to be made.*

Suprà, 2. 4.

AMENDS.

I. *Pledges to make, by distrainee.*

See 877. (*b*).

II. *Tender of, See* 245. n. 265.

ASSUMPSIT.

I. *Whether maintainable where contract substantially by deed.*

1. By a deed of the 18th *April* 1838, the defendants contracted to employ the plaintiff in the management of certain chemical works, for the term of seven years from the 30th of *June* then next, with a proviso, that if a process for making a certain quantity of sulphate of quinine, on which the plaintiff was then engaged, should not be in operation upon the 21st of *June*, then the defendants should, on or at any time after that day, have power to determine the contract by notice in writing.

On the 9th of *August* 1838, a second agreement in writing, but not under seal, was entered into between the parties, which, after stating that the plaintiff had not succeeded in producing the sulphate of quinine as stipulated in the deed, extended the period for its production until the 21st of *December* 1838.

The plaintiff having brought assumpsit upon the second agreement, for a breach of stipulations contained in the deed: Held, that the action could not be maintained, the second agreement being merely an agreement for the extension of the time mentioned in the deed, and not an agreement incorporating the terms of that deed, which was still in force. *Gwynne* v. *Davy*. Page 857

II. *Pleadings in,*

See ATTORNEY, 5.
AUCTION, 2.
MONEY HAD AND RECEIVED, 1.

2. What must be specially pleaded under new rules. Page 233. (*a*).

3. The plaintiff and the defendant agreed that the former should give up to the latter a business which they had carried on in partnership, in consideration of the plaintiff's receiving from the defendant a promissory note for 730*l.*, payable by instalments; and it was further agreed, that in case a certain mortgage of 2000*l.* on the plaintiff's property should be called in before the note was paid off, the defendant should immediately pay the balance remaining due on the note, or find a like mortgage, free of expense to the plaintiff.

The plaintiff (after the mortgagees had called in the mortgage but before the same was paid off,) brought an action in the Exchequer on the agreement, alleging, for breach, the non-delivery of the note for 730*l.*, which action terminated, under a judge's order, in the defendant's giving the plaintiff (among other things) a note for 505*l.*

The plaintiff having brought a second action in this court upon the agreement, in which the breach assigned was, that although the mortgage money had been called in, the defendant had neither paid the balance due to him nor provided a fresh mortgage, whereby

without stating whether the promises were made before or during the marriage, it is bad on special demurrer, *per Maule* J. *France and Another* v. *White and Others.* Page 731

8. But where to such a declaration the defendants merely plead (in abatement) that the promises were made by the defendants and *C.* jointly, and not by the defendants alone, and a verdict is found for the plaintiff on an issue taken upon a replication stating that the promises were not made by the defendants and *C.* jointly, the court will presume, for the purpose of supporting the declaration, that the promises were made before the marriage, when a joint liability might be created. *Ibid.*

9. *Semble*, that a plea in abatement in assumpsit, that the alleged promises were made by the defendants and one *C.*, and not by the defendants only, contains a sufficient confession of the promises in the declaration, to entitle the plaintiff to judgment after a verdict negativing the plea. *Ibid.*

10. By a contract between the plaintiff and *A.* and *B.*, it was agreed that the plaintiff should serve *A.* and *B.* as foreman in their business for seven years, if *A.* and *B.*, or either of them, should so long live. The plaintiff having subsequently discovered that at the time of making the contract *C.* was a dormant partner with *A.* and *B.*, declared upon the contract as an agreement to serve *A.* and *B.* and *C.*, or the survivor of them, for the period therein named:

Held, that the contract was misdescribed. *Beckham* v. *Knight and Another.* Page 738

11. *Semble*, that if the contract had been properly declared upon, *C.* would have been liable under the agreement. *Ibid.*

ATTACHMENT.

See FOREIGN ATTACHMENT. SERVICE.

I. *For disobeying judge's order.*

1. Where it appeared that the defendants had *bonâ fide* obeyed an order, so far as lay in their power, the court refused to grant an attachment against them for non-compliance with the order. *Clarke* v. *Blakesley and Others.* 567

II. *For disobeying rule of court.*

See ARBITRAMENT, 2.

2. An attachment will not be granted for not delivering up papers pursuant to a rule of court, unless the demand be made by a party duly authorised to make it. *Doe dem. Hickman* v. *Hickman.* 566

3. Nor unless the authority of the party making the demand be shewn at the time of making it. *Ibid.*

III. *For disobeying a subpœna.*

See WITNESS, 3.

ATTORNEY.

I. *Authority of,*

And see PRACTICE, 18. 22.

1. Prayer of process by, in the Common Pleas. Page 588 n.

II. *Bill of costs.*

2. Although an attorney's bill contain items not specified according to the 2 *G.* 2. *c.* 23. *s.* 23., he may still recover the portion of his bill as to which the provisions of the statute have been complied with. *Waller* v. *Lacy.* 54

3. Seven items in the bill were stated in the aggregate, but two only were found by an arbitrator to whom the cause had been referred, to be for business done at law or in equity: Held, that the plaintiffs might recover the five other items. *Ibid.*

4. An attorney is bound to deliver to his client a bill containing the whole of his charges: a delivery of a bill, containing only the items of the extra costs, and omitting the items of taxed costs which have been received from the other side, is not a sufficient compliance with the statute. *Ibid.*

5. An attorney who has several demands against his client, some of which are barred by the statute of limitations, has no right to appropriate, in payment of the demands so barred, a sum received by him from a third person on account of his client. *Ibid.*

6. The defendant having a claim against the plaintiff, the latter, at the foot of his bill of costs, acknowledged the debt as follows: — "By Mr. *Lacy's* bill," leaving a blank for the amount. He then wrote below, "Agreeably to your request, above I send you my bill, which I will thank you to peruse, and, if correct, favour me with a bill for the balance." Held, that this was a sufficient acknowledgment of the defendant's claim to take it out of the statute of limitations. *Waller* v. *Lacy.* Page 54

III. *Lien for bill.*

7. Money is paid into court by a defendant who dies before verdict or interlocutory judgment, whereby the suit abates. The money can be paid out of court only to the personal representative of the defendant. An application on the part of his attorney will not be entertained. *Palmer* v. *Reiffenstein.* 94

8. After a verdict for the plaintiff, and pending a rule for a new trial, the plaintiff dies. Cause cannot be shewn on behalf of the attorney who claims a lien on the verdict for his costs. *Shoman* v. *Allen.* 96. (*c*).

IV. *When disqualified from practising.*

9. In an action against the acceptor of a bill of exchange indorsed to the plaintiff after it became due, the defendant pleaded that the consideration for the bill was business done for him by one *W.* as his attorney and solicitor, and alleged that *W.* in 1810 was admitted an attorney of the King's Bench and a solicitor in Chancery, but took out no certificate till 1813; that from that time he practised and renewed his certificate till 1819, when he took out

no certificate for one year and upwards; that he was readmitted in the King's Bench in 1823, but neglected, for more than a year, to obtain a certificate, and that at the time the business in question was done, he had not been re-admitted, in any of the courts of law, except as aforesaid. The replication stated that, in 1826, *W.* was admitted an attorney of the Common Pleas, and was re-admitted in Chancery, and regularly took out his certificate for that and the four following years, and that the business for which the bill of exchange was given was transacted during those five years. The rejoinder alleged, that the admission in the Common Pleas was by virtue of a contract inrolled in the King's Bench, and under which *W.* had been admitted in that court in 1810, and re-admitted in 1823; and that he "was so admitted in the said court of Common Pleas, without payment of any further duty in that behalf, according to the form of the statute in that behalf." Held, on demurrer to the rejoinder, that the admission in this court must be considered as an original admission; and that the nonpayment of the stamp duty at the time, although it may have subjected the party to penalties, did not render the admission void; and consequently that he might maintain an action for his fees, and might at any time give a good title to an indorsee of a bill accepted upon that consideration. *Middleton* v. *Chambers.* Page 97

V. *Proceedings against,*
See SERVICE.

10. The court will not issue an attachment against an attorney, for not delivering up papers pursuant to a rule of court, unless it appear that the demand was by a party duly authorised to make it. *Doe dem. Hickman* v. *Hickman.* 566

11. Nor unless it appear that the authority of the party making the demand was shewn at the time of making it. *Ibid.*

ATTORNEY-GENERAL.

1. The statement that the crown is interested, and that the Attorney-General does not assent to the issuing of a writ of *nisi prius*, but requires a trial at bar, may be made in this court by the Attorney-General *ore tenus*. *Paddock* v. *Forrester.* 583

2. Appointment of, for life. 587. (*b*).

ATTORNMENT, 90. (*g*), 127. (*b*), 128. (*a*), 129.

AUCTION.

I. *Pleadings in an action for non-performance of conditions of sale.*

1. It was by the conditions of sale provided that the vendor should, within twenty days after the sale, deliver an abstract of title, and that all objections thereto which should not be taken in writing within ten days afterwards, should be considered as waived.

In an action by the purchaser against the vendor, for breach of the conditions of sale, the latter pleaded that he, within twenty days after the sale, delivered an abstract, but that the plaintiff did not within ten days afterwards take any objection to the title in writing. The plaintiff replied that, although the defendant did within twenty days deliver an abstract, yet that he did not by the said abstract disclose "a good and sufficient title," and that the plaintiff did within ten days after the delivery of the abstract take objections to the title in writing, concluding to the country. Held, that the replication did not introduce new matter, but amounted to a traverse of the latter allegation in the plea, and therefore properly concluded to the country. *Smith* v. *Tanner and Another.* Page 802

AVERMENT OF PLEAS.

See VERIFICATION.

AVOWRY,

See AMENDMENT, 3.

For a cause different from that for which the distress was declared by the distrainor to be taken. 581. (*a*).

AWARD.

See ARBITRAMENT.

BAIL IN ERROR.

I. *Money in lieu of.*

1. Money deposited in lieu of bail in error, cannot, upon the judgment being reversed, be retained to satisfy the costs of a demurrer argued in the court below. *Collins and Others* v. *Gwynne.* Page 938

BAILIFF.

I. *Officer of corporation.*

See CANTERBURY.

II. *Agent of landlord.*

See AVOWRY.
COSTS, 3.

BAILMENT.

I. *Locatio custodiæ.*

1. In an action against a bailee for damaging some goods and neglecting to redeliver others, a bill of particulars is delivered, containing a list of articles damaged, and also a list of articles not re-delivered. The plaintiff cannot recover, as for goods not re-delivered, in respect of glass sent back in a broken state. *Moss* v. *Smith.* 228

BANKERS.

I. *Liability of, to customer.*

1. Whether bound to make advances in respect of securities in his hands.

See 929. n.

II. *Lien of,*

See EXCHEQUER BILLS.

III. *Short bills.*

See 930. n.

IV. Securities held by, how enforced.

See BILLS AND NOTES, 1, 2.

BANKRUPT.

See PLEADING, 8.

I. *Act of bankruptcy.*

See post, 7.

1. Ruled, at nisi prius, by *Littledale* J., that an assignment by an innkeeper of all the furniture and other effects at the inn (except his stock in trade, money, and book debts), to a creditor, in trust to pay himself, returning the surplus to the innkeeper, inasmuch as it disabled the latter from carrying on his business, amounted to an act of bankruptcy if the party were insolvent at the time of the assignment. *Porter, Assignee, &c.* v. *Walker.* Page 686

II. *What vests in assignees.*

2. Under the *Irish* Bankrupt Act, 6 & 7 *W.*4. *c.*14., the right of suing in an *English* court, upon a contract made by the bankrupts in *England* with a person resident in *England*, passes to the assignees under an *Irish* commission of bankrupt. *Ferguson and Others, Assignees, &c.*, v. *Spencer and Another.* 987

III. *Reputed ownership.*

3. Whether a trader was, at the time of his bankruptcy, the reputed owner of particular property, is a question of fact, depending upon a consideration of all the circumstances attending the possession. *Edwards and Others, Assignees of Weston*, v. *Scott and Another.* 962

4. Where, therefore, in trover, by assignees, for a policy of insurance, the defendants pleaded that the plaintiffs were not possessed as assignees; and at the trial it appeared, — that in 1836 the policy had been deposited by *A.* with the defendants, as a security for an advance of money; that in *March* 1837 *A.* became embarrassed, and a meeting was called of his creditors, at which a list of his debts was read aloud and handed round the room, which list contained a statement that the policy in question was deposited with the defendants as a security for 3000*l.*, from which sum 1200*l.*, the estimated value of the policy, was deducted, leaving the defendants creditors for the balance, 1800*l.*; that on the 15th *July* 1837 (the *fiat* being granted on the 27th), an agent of the defendants called at the insurance office, and asked if the premium on the policy had been paid, at the same time stating that the policy had been deposited with the defendants; that the insurance company kept a book for the purpose of entering *written* notices of assignments and deposits of policies, which book contained no such entry with respect to the policy in question; and that the insurance office paid no regard to a verbal notice: it was held, that a direction — that the defendants had not got rid of the apparent ownership of *A.*, by what passed at the meeting of the creditors, and by

the conversation at the office, such conversation not being followed up by a notice *in writing*, — was wrong; it being a question for the jury whether, under those circumstances, *A.* was the reputed owner of the policy at the time of his bankruptcy. *Edwards and Others, Assignees of Weston*, v. *Scott and Another.* Page 962

IV. *Certificate.*

5. A trader who has obtained his certificate under a commission of bankrupt issued against him in *Ireland*, under the provisions of 6 & 7 *W.* 4. *c.* 14. is a competent witness to support an action brought in *England* by his assignees, for a debt alleged to have been due to the trader before he became bankrupt. *Ferguson and Others, Assignees, &c.*, v. *Spencer and Another.* 989

6. So, to negative a set-off upon a debt alleged to have been due from the witness to the defendant at the time of the bankruptcy. *Ibid.*

V. *Evidence, in action by assignees.* *Vide suprà*, 5, 6.

7. In assumpsit by assignees, for money had and received to their use after the bankruptcy, the defendant pleaded non assumpsit, and that the plaintiffs were not assignees, and gave notice to dispute the act of bankruptcy upon which the party was declared a bankrupt. The plaintiffs proved an act of bankruptcy, and the receipt of money belonging to the estate between the act of bankruptcy and the fiat: Held, that in the absence of proof of any other act of bankruptcy, the defendant, by giving notice to dispute the act of bankruptcy only, must be taken to have admitted a trading and a petitioning creditor's debt, co-existent with the act of bankruptcy proved. *Porter, Assignee, &c.* v. *Walker.* Page 686

BAR, TRIAL AT.

See ATTORNEY-GENERAL, 1.

BARON AND FEME.

See ADMINISTRATION, 1, 2.
ASSUMPSIT, 7, 8.
FINES AND RECOVERIES, 2.
PLEADING, 2.

BARRISTER.

See PRACTICE, 18.

BEDFORD LEVEL.

See ASSUMPSIT, 4.

BELLMAN.

See BOROUGH, 1.

BENEFIT SOCIETY.

I. *Power of committee.*

1. By one of the rules of a benefit society, the committee were to meet "for the purpose of examining candidates for admission, and to settle and determine any matter relating to the breach or non-observance of the articles of the society by any of its members, and their exclusion in consequence thereof, and to settle and determine *any other matter or thing relating to the society*, subject nevertheless to the confirm-

ation of the society at their next quarterly meeting."

Held, that the words in italics were to be considered in conjunction with, and as qualified by, the preceding portion of the rule; and that they did not authorise the committee to enter into a contract which was in violation of the other rules of the society; *dissentiente Maule* J. *Tyrrell* v. *Woolley and Another.* Page 809

2. The other rules established a graduated scale of allowance to sick members, regulated by the state of the funds of the society, and by the period that the members continued a charge upon it, and prohibited them from working while they received such allowance; and also provided for the payment of certain sums on the death of a member, or of a member's wife.

Held, that the committee were not authorised in making a contract with a sick member (who had met with an accident which disabled him from working at his trade), allowing him a fixed weekly sum for life, with permission to attend to any business that he might be able to transact, in consideration of his giving up all further claim on the society during his life, and at his decease; *dissentiente Maule* J. *Ibid.*

Held, also, that the society, which was established before the 10 *G.* 4. *c.* 36., could not enter into any engagement, so as to bind the then members and also those who might afterwards become members of it. *Ibid.* Page 809

BILL OF EXCEPTIONS.

What may be introduced into, 473

BILL OF PARCELS.

See WITNESS, 2.

BILL, SINGLE.

Infant may bind himself by bill under seal without a penalty. 551. (*b*)

BILLS AND NOTES.

See ASSUMPSIT, 3.
TRESPASS, 1.

I. *How drawn.*

1. A plea to an action of assumpsit, that the plaintiff drew and the defendant accepted, a bill of exchange for 60*l.* in satisfaction of the plaintiff's demand, is not supported by evidence, that the defendant transmitted to the plaintiff a blank acceptance with 60*l.* in figures written in the margin, which the plaintiff altered and filled up as a bill for 46*l.* before he signed his name to it as a drawer. *Baker* v. *Jubber.* 212

2. *A.* being manager of a joint stock bank, having its principal establishment in *London*, with branch banks in *Birmingham* and other places, at which there are local managers, a note is taken at the *Birmingham* branch bank to secure an account there, by which *B.* promises to pay 1000*l.* to the manager of such joint stock bank.

and it was not shewn that he had left funds for payment. Held, that the presentment was sufficient to maintain the affirmative of an issue raised on the due presentment of the bill, in an action against an indorser. *Buxton* v. *Jones.* Page 83

IV. *Notice of dishonour.*

6. In an action of debt, by an indorsee against an indorser of a promissory note, the following letter was held to be an insufficient notice of dishonour: —

"This is to inform you, that the bill I took of you, 15*l.* 2*s.* 6*d.*, is not took up, and 4*s.* 6*d.* expense; and the money I must pay immediately. My son will be in *London* on *Friday* morning." *Messenger* v. *Southey.* 76

7. Party to a bill not discharged, by the law of *France*, by laches of holder in not giving notice of dishonour, unless actually damnified by want of notice. 762. n.

BLANKS.

See AMENDMENT, 1.
ATTORNEY, 6.
BILLS AND NOTES, 1.
PRACTICE, 10.

BONA NOTABILIA.

See ADMINISTRATION, 1.

BOROUGH.

I. *Power of town council.*

1. Under the municipal corporation act (sect. 65.), the council have power to require from a common crier, as a ministerial or executive officer of the borough, the delivery up of the town bell, as part of the goods of the body corporate, such crier having been appointed by the old corporation, and having been removed from office upon the election of the council under the act. *Baylis* v. *Strickland.* Page 591

2. And, in case of refusal, he may be proceeded against by summary conviction before the justices of the borough, in the manner pointed out in the sixtieth section. *Ibid.*

II. *Power of justices.*

3. The borough justices have jurisdiction, upon an information laid before them, in which such an offence is charged. *Ibid.*

4. And where the conviction upon such an information is still subsisting, and is not void, *ex facie*, neither the justices nor the officer who executes the warrant of commitment issued by them in pursuance of such conviction, can be sued as trespassers. *Ibid.*

5. When such a conviction has been quashed upon appeal, the party aggrieved by a commitment under the justices' warrant may bring case under 43 *G.* 3. *c.* 141., but cannot maintain trespass. *Ibid.*

III. *Borough rate.*

6. The council of the borough of *S.* ordered a borough rate to be made; and assessed, upon the township of *C.*, in respect of a portion of it, namely, the hamlet of *E.*, which was within the borough, a certain

sum. *A.*, as overseer of the township, was called upon to pay the assessment, and, having failed to do so, *B.*, as mayor of the borough, issued a warrant, under which *A.*'s goods were seized. *A.* having brought trespass against *B.* for this seizure: Held, that the council had no authority to make the assessment in question, and that, inasmuch as *B.* had no jurisdiction to issue the warrant, trespass was the proper remedy. *Fernley* v. *Worthington.* Page 491

BOUNDARY.

See MINES, 1.

BREACHES, ASSIGNMENT OF.

See ASSUMPSIT, 4.

BREWER.

See COVENANT, 6, 7.

BRIDGE.

I. *Dedication of, to the public.*

1. By an act of parliament an incorporated canal company were required to make and maintain bridges over the canal, for the use of the occupiers of adjoining lands, and also where the canal was carried across any highway, public bridleway, or footpath. In 1804 the company erected a swivel bridge at a spot where there was a public bridleway and footpath, which bridge, as a carriageway, was intended to be for the exclusive accommodation of the tenants of property called the *R.* estate. From 1810 to 1822 the public occasionally used the bridge with carriages. In 1822 the neighbourhood became very populous; and from 1822 to 1832 the bridge was used by the public as a carriageway without interruption. In 1832 the company began to exact a toll from persons not tenants of the *R.* estate, and they removed the swivel bridge and built a stone bridge in its stead.

In trespass by the company for passing along the bridge with a horse and chaise, the judge told the jury that, supposing the bridge to have been originally built as a carriageway for the exclusive accommodation of the tenants of the *R.* estate, still, if in consequence of the acts of the company, an idea grew up in the minds of the public that the company intended to dedicate the bridge to the public use, such acts would amount to a dedication.

Held, that there was no misdirection. *The Grand Surrey Canal Company* v. *Hall.* Page 392

2. Held also, that there was nothing in the constitution of the company, or in the nature of their property, to prevent them from dedicating the bridge to the public. *Ibid.*

3. Held also, that the evidence warranted the jury in finding that there had been a dedication. *Ibid.*

BRISTOL.

1. Custom of foreign attachment in, *Bruce* v. *Wait.* Page 1
2. Tolzey Court of, *Ibid.*

BURGAGE, 263. (*a*).

BURGLARY, 86. n.

CALLS.

See JOINT STOCK COMPANY, 2. 8.

CANAL.

See BRIDGE.

CANONRY.

Not recoverable in ejectment. *Doe dem. Butcher* v. *Musgrave.* 625
And see post, 1058. (*a*).

CANTERBURY,

Governed by two bailiffs until reign of *Henry* VI. 546. (*a*), 547. (*a*).

CASE, ACTION ON THE.

And see BOROUGH, 5.

I. *Where maintainable, for misfeasance.*

1. In an action against a railway company, for an injury to the plaintiff's house, the declaration alleged that the company did not use due care or skill, or take proper precautions, in making the railway and excavations; and that they so carelessly, &c. proceeded in making the railway and excavations, without taking due care and precaution to prevent the house so being near to the house of the plaintiff, from falling upon and against the house of the plaintiff, that by reason of the careless, &c. conduct of the company, and for want of due and proper precaution by them upon the occasion aforesaid, the house so being near, &c., gave way, and fell upon and against the house of the plaintiff, whereby &c. On general demurrer, held sufficient. *Davis* v. *The London and Blackwall Railway Company.* Page 799

II. *Where maintainable, for malfeasance.*

Infrà, 5. JUSTICE OF PEACE, II.

2. In an action, for an injury which the plaintiff had sustained from being thrown down upon iron instruments placed by the defendant in the highway, contrary to the common law, and to the provisions of a local act of parliament, the defence set up, *under a plea of not guilty*, was negligence on the part of the plaintiff, of which negligence no distinct evidence was given. The judge left it to the jury to say whether the plaintiff had been so deficient in reasonable and ordinary care that he had brought the accident upon himself.

A verdict having been found for the defendant, a rule for a new trial was refused on the ground of misdirection; but it was granted, on payment of costs, as upon a verdict against evidence, and was

afterwards made absolute. *Marriott* v. *Stanley.* Page 568

3. For refusing vote of burgage tenant. *See* 267. (*a*).

III. *Costs in actions on the case, under* 3 & 4 *Vict. c.* 24.

4. At the second trial of *Marriott* v. *Stanley*, (*suprà*, 2.) a verdict was found for the plaintiff, damages 1*s.*, and the judge refused to certify, on the ground that it was not a case in which he had power to do so under the 3 & 4 *Vict. c.* 24. *s.* 2.

Held, that although the action was not one in which the judge could grant a certificate, it was still within the statute, and that the plaintiff was not entitled to his costs. *Marriott* v. *Stanley.* 853

5. In an action for a nuisance in carrying on an offensive trade, to which the plea is not guilty, the judge has power, in the event of the plaintiff's recovering less than 40*s.* damages, to certify, under the 3 & 4 *Vict. c.* 24. *s.* 2., that the action was really brought to try a right besides the mere right to recover damages, in order to entitle the plaintiff to his costs. *Shuttleworth* v. *Cocker.* 829

6. Unless it appear from the declaration, that the action could not really have been brought to try a right beyond the mere question of damages, the case is within the act. *Ibid.*

7. The granting of a certificate in such a case is entirely a matter for the discretion of the judge presiding at the trial, and the court cannot review his decision. *Shuttleworth* v. *Cocker.* Page 829

8. Where an informal certificate was given immediately after the trial, it was held that the judge might amend it afterwards, as being a misprision of the officer. *Ibid.*

9. *Semble*, that the certificate must be granted immediately after the trial is closed. *Ibid.*

CERTIFICATE.

I. *Of bankrupt's conformity.* *See* BANKRUPT.

II. *For costs.* *See* CASE, ACTION ON, III.

III. *For special jury.* 250. (*a*).

IV. *Of customs of London.* 539. (*b*).

V. *That validity of patent came in question.* 249. (*b*).

CERTIORARI, 17, 18, 19, 20, 21, 22, 23, 24.

CHAIRMAN.

See COVENANT, 5.
JOINT STOCK COMPANY, 4.

CHARITABLE USES.

See MORTMAIN ACT.

CHARTER-PARTY.

See SHIP.

CHESTER,

Foreign attachment in Pentice Court of, 41. (*a*).

CHRISTIAN NAME. 783.

CHURCH-RATES.

See 534. n.

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Page 534. n.

CLAIM.
I. *Of property in goods attached.*
See FOREIGN ATTACHMENT, 3.

CLERK.
I. *Residence of, how described.*
See AFFIDAVIT, 1.
II. *Of the inrolments.*
See MORTMAIN ACT, 1.

CLOSE.
I. *Identity of,*
See TRESPASS, 5.

COFFERDAMS.
See ASSUMPSIT, 4.

COMMISSIONER, ASSISTANT TITHE.
See CONSOLIDATION OF ACTIONS.

COMMITMENT.
See BOROUGH, 4.

COMMITTEE.
See JOINT STOCK COMPANY.

COMMON PLEAS.
I. *Jurisdiction of,*
1. In error from inferior court of record. 2. (*a*).
II. *Who may appear in,*
2. Attorney, to pray process. 588. n.
3. Attorney-general, to pray that a writ of *nisi prius* may not issue. 583

COMMORANCY.
See ADMINISTRATION, 1.

COMPOUND INTEREST.
Page 277. (*b*)

COMPTER, 545. n.

CONCESSIT SOLVERE.
See 20. 22, 23. 28.

CONCURRENT ACTS.
See PLEADING, 14, 15.

CONDITION PRECEDENT.
I. *Whether to be specially pleaded.*
See ASSUMPSIT, 4. Vol. II. 9.
1. Where a declaration states a contract, in terms denoting that a particular act, which the plaintiff has engaged to do, is to be independent of, or concurrent with, an act on the part of the defendant, if, from the position of the parties, or from the nature of the agreement, such act constitutes a condition precedent, the proper course is, to plead non assumpsit, and give the special matter in evidence; *per Maule* J. *Kemble* v. *Mills.* 757
2. If the defence be specially pleaded, *semble*, that the plea will be bad on special demurrer, as amounting to the general issue, —*per eundem. Ibid.*

CONDITIONS OF SALE.
See AUCTION.

CONFESSION AND AVOIDANCE.

See ASSUMPSIT, 8.

CONSIDERATION.

I. *Where sufficient to support an assumpsit.*

1. An executory consideration need not be founded upon an antecedent request. Page 265. (*b*)

See also ASSUMPSIT, 4.
BILLS AND NOTES, II.

CONSOLIDATION OF ACTIONS.

I. *Where, ordered by the court.*

1. An award was made by an assistant tithe commissioner under 6 & 7 *W.* 4. *c.* 71., with respect to certain alleged district moduses.

The vicar brought an action against one landowner, and 74 landowners brought actions against the vicar, to try the disputed rights under issues to be directed pursuant to the statute.

The court refused to order the 74 actions against the vicar to abide the event of the action brought by him. *Ward, Clerk,* v. *Pomfret.* 559

CONSULTATIONS.

See COSTS, 7.

CONTRACTS.

To be pleaded according to their legal effect. 281 (*d*)

CONUSANCE OF REPLEVINS.

Prescription to have, 547. n.

CONVEYANCE,

Necessity of tender of, Page 193. n.

CONVICTION.

1. Where a conviction is quashed, trespass is not maintainable. *Baylis* v. *Strickland.* 591

COSTS.

See ATTORNEY, II. III.
NEW TRIAL, 2.

I. *Liability to costs.*

1. Costs of making order a rule of court, by whom to be paid. 278
2. Costs in replevin, liability of landlord for, where action against bailiff. 447 (*a*)
3. Under a rule of court ordering that the plaintiff shall be at liberty to proceed to trial on payment to the defendant of the costs of the day, and of the costs of and occasioned by certain applications to the court, the defendant is not entitled to the costs of a special jury, — of an application by the defendants to put off the trial, — of consultations antecedent to, and in preparation for the applications mentioned in the rule, — or of a short-hand writer's notes of a discussion upon motions in Chancery, which notes were afterwards brought before the court in consequence of an intimation that the court would require to be furnished with information respecting such motions. *Morgan and Another* v. *Muller and Another.* 825

II. *Restriction on plaintiff's right to costs, by* 3 & 4 *Vict. c.* 24. *s.* 2.

4. Case for negligence, in exposing ploughshares for sale in a street, whereby the plaintiff was thrown down and injured. Plea: not guilty. Verdict for the plaintiff, damages, 1*s.*

Held, that although the action was not one in which the judge could grant a certificate, under 3 & 4 *Vict. c.* 24. *s.* 2. it was still within the statute, and that the plaintiff was not entitled to his costs. *Marriott* v. *Stanley.* Page 853

5. In an action on the case for a nuisance in carrying on an offensive trade, to which the plea is not guilty, the judge has the power, in the event of the plaintiff's recovering less than 40*s.* damages, to certify under the 3 & 4 *Vict. c.* 24. *s.* 2., that the action was really brought to try a right besides the mere right to recover damages, — in order to entitle the plaintiff to his costs. *Shuttleworth* v. *Cocker.* 829

6. Unless it appear from the declaration, that the action could not really have been brought to try such a right, the case is within the act. *Ibid.*

7. And the granting of the certificate is entirely a matter for the discretion of the judge presiding at the trial, and the court cannot review his decision. *Ibid.*

8. *Semble,* that the certificate must be granted immediately after the trial is closed. *Ibid.*

9. Where an informal certificate is given immediately after the trial, the judge may amend it afterwards, as being a misprision of the officer. Page 829

III. *Restriction by the court.*

10. A plaintiff in an action for unliquidated damages, who refuses to accept from the defendant, in satisfaction of the suit, a sum which he afterwards takes, is not entitled to the costs incurred after the refusal. *Fisher* v. *Payne.* 265

IV. *Defendant's right to costs.*

And see antè, 1. 3. *post,* 15, 16.

11. Where a rule for judgment in ejectment against the casual ejector is served on persons who appear and shew that they are not in possession, and have no claim to the premises, they are entitled to the costs of being brought before the court. *Doe dem. Tansley and Others* v. *Roe.* 490

12. The affidavit in support of a motion by a defendant to enter a suggestion for double costs under the *Middlesex* County Court Act (23 *G.* 2. *c.* 33. *s.* 19.) need not state that the cause of action arose within the jurisdiction of the county court; it is sufficient if it appear that the defendant, at the time of action brought, resided within such jurisdiction. *Thom* v. *Chinnock.* 216

13. The defendant will be entitled to have a suggestion entered, unless it be shewn by the other side, that part of the cause of action arose out of the jurisdiction. *Ibid.*

14. Where part of the cause of action appears to have arisen out of the jurisdiction of the county court,

the court will not allow a suggestion to be entered. Page 216

V. *Security for costs.*

15. Where an action was brought by a man in humble circumstances, at the instigation and costs of his landlord, the court stayed the proceedings until the latter gave the defendant security for costs. *Ball* v. *Ross.* 445

16. A plaintiff went to reside abroad subsequently to his cause being set down for argument in the demurrer paper. On an application for security for costs, the court directed that the demurrer should be allowed to be argued; and in the event of the judgment being in favour of the plaintiff, that proceedings should be stayed until he gave security for costs. *Kemble* v. *Mills.* 565

VI. *Mistake of jury with respect to,*

17. It is no ground for setting aside a verdict, that a jury have given only a shilling damages, under a mistaken impression that it would carry costs. *Mears* v. *Griffin.* 796

COUNSEL.

See PRACTICE, 18.

COUNTING-HOUSE.

See EJECTMENT, 4.

COUNTY COURT.

See 226. 546. (*b*).

I. *Jurisdiction of,*

1. The affidavit in support of a motion by a defendant to enter a suggestion for double costs, under the *Middlesex* County Court Act, (23 G. 2. *c.* 33. *s.* 19.) need not state that the cause of action arose within the jurisdiction of the county court. *Thom* v. *Chinnock.* Page 216

2. It is sufficient if it appear that the defendant, at the time of action brought, resided within such jurisdiction. *Ibid.*

3. The defendant will be entitled to a suggestion, unless it be shewn by the other side, that part of the cause of action arose out of the jurisdiction of the county court. *Ibid.*

4. Where part of the cause of action has arisen out of the jurisdiction, a suggestion will not be allowed to be entered. *Ibid.*

COURT OF DIRECTORS.

See COVENANT, 5.

I. *What shall be considered as,*

See JOINT STOCK COMPANY, 5.

COVENANT.

I. *Action of, where maintainable.*

1. By a deed of the 18th of *April* 1838 the defendants contracted to employ the plaintiff in the management of certain chemical works for the term of seven years, from the 30th day of *June* then next, with a promise that if a process for making a certain quantity of sulphate of quinine, on which the plaintiff was then engaged, should not be in operation upon the 21st of *June*, then the defendants should, on or at any time after that day, have power to determine the contract by notice in writing.

On the 9th of *August* 1838 a second agreement in writing, but not under seal, was entered into between the parties, which, after stating that the plaintiff had not succeeded in producing the sulphate of quinine as stipulated in the deed, extended the period for its production until the 21st of *December* 1838.

The plaintiff having brought assumpsit upon the second agreement, for a breach of the stipulations contained in the deed: Held, that the action could not be maintained, the second agreement being merely an agreement for the extension of the time mentioned in the deed, which was still in force, and not a new contract incorporating the terms of that deed. *Gwynne* v. *Davy.* Page 857

2. Liability of assignee upon covenant of assignor. 208. n.
3. Covenant to reside on the demised premises. 208. n.
4. Covenant upon the word "demisi." 205 (*a*)
5. Covenant cannot be maintained against the chairman of the board of directors of a joint stock company, upon a deed under the seal of a former chairman of the company, though sealed by him for, and on behalf of, the company. *Hall* v. *Bainbridge.* 42

II. *How declared upon.*

6. A covenant by the lessor of a brewery, that he will not "during the continuance of the demise, carry on the business of a brewer or merchant, or agent for the sale of ale, &c. in *S.* or elsewhere, or in other manner howsoever be concerned in the said business," is void, as being a general restraint of trade. *Hinde and Others* v. *Gray.* Page 195
7. Covenant upon an indenture, whereby the defendant demised to the plaintiffs for ten years a brewery at *S.*, "and also the exclusive, or such other privilege as the defendant then enjoyed, of supplying ale, &c. to certain public houses then the property of the defendant, or then under his control." The declaration averred, that at the time of making the indenture, the defendant was the landlord and owner of one of the public houses, and in the occupation thereof, and that afterwards he demised it to *G.*, who covenanted with the defendant to purchase all the ale, &c. consumed on the premises from the plaintiffs. Breach, that *G.* during his tenancy, did not purchase all the ale, &c. from the plaintiffs, but purchased it from the defendant and others. Held, that this breach was not well assigned. *Ibid.*
8. Held also, that the declaration should have shewn *what* privilege the defendant possessed. *Ibid.*
9. *Semble*, that no covenant with respect to such a privilege can be implied from the word "demise." *Ibid.*

COVERTURE.
See BARON AND FEME.
DIVORCE, 1, 2.
PLEADING, 2.

CRIER.
See BOROUGH, 1.

CROWN.
See PREROGATIVE.

CUSTOMS.
Page 1. 39.(*a*), 41.(*a*), 539.(*b*).

CUTTING TREES, 257.

DAMAGE FEASANT.
Pleadings on distress for, 246

DAMAGE, WILFUL. 258.(*a*).

DAMAGES.
I. *What recoverable as,*
See JOINT STOCK COMPANIES, 6.
POSSESSION, 3.
II. *Measure of,*
See 224.(*b*), 796. 857. n.
III. *Excessive,*
See VERDICT.
IV. *Vindictive,* 224.(*b*).
V. *Unliquidated,*
See COSTS, 12.

DEAN AND CHAPTER.
See MORTGAGE, 3.
Post, 1058. n.

DEATH.
See NEW TRIAL, 3, 4.
PRACTICE, 21.
SHRIEVALTY, 1, 2.

DEBT, ACTION OF.
See BILLS AND NOTES, 6.

DECLARATION OF USES.
See MORTMAIN, 1.

DEDICATION OF HIGHWAYS.
By incorporated company.
See BRIDGE, 1, 2.

DEED, 578. n.
And see ADMINISTRATION, 1.
ASSUMPSIT, 1.
EVIDENCE, 1.
PARTNER, 1, 2.

DEFAMATORY WORDS,
Libel for, in ecclesiastical courts.
Page 519. n.

DE INJURIA, 235. 791.

DEMAND.
See ATTACHMENT, 2, 3.
JUSTICE OF PEACE.

DEMISE.
See COVENANT, 6, 7.
I. *Possession under,*
1. Under a demise of mines and minerals under lands, which consist of a long continuous tract of waste, the working under one part of these lands is evidence of possession of the entire subject of the

demise. *Taylor* v. *Parry and Others.* Page 604

DEMISI.

Where covenant raised by this word. 205. (*a*)

DEMURRAGE.

See SHIP.

DEMURRER.

See BAIL IN ERROR, 1. COSTS, 13.

1. Nature and form of, 201. n.
2. Origin of modern doctrine as to a demurrer being *too large.* 202. n.
3. Modern practice of *over-ruling* demurrers. 202. n.

And see 5. 20.

DEPARTURE, IN PLEADING.

729. (*b*).

DETINUE.

I. *For deeds.* 578. n.

DEVISE.

I. *Construction of,* 357. n.

1. In construing a devise, words are to be taken to comprehend a subject which falls within the usual sense of such words, unless the will contain a manifest and plain declaration to the contrary. *Doe dem. Howell* v. *Thomas and Others.* 335
2. Where, therefore, *A.* seised of *Whiteacre, Blackacre,* and *Greenacre,* — of which *Whiteacre* stands limited to *A.*'s issue in strict settlement, and must on the death of *A.* vest in *B.*, his eldest son, as first entailee, — devises to his son *C. Blackacre,* and devises to his son *D.* all the remainder of his lands over which he has "a power of disposal;" the reversion of *Whiteacre* passes with *Greenacre* to *D.*; although, in a remote part of the will, *A.*, in speaking of his control over *B.*, mentions *Whiteacre,* as an estate "over which he has no power." *Doe dem. Howell* v. *Thomas and Others.* Page 335
3. By a will, made before 7 *W.* 4. & 1 *Vict. c.* 26, *s.* 29., *A.* devised to *B.* for life, remainder to the eldest son of *B.*; but for want of such issue, then to the daughter or daughters of *B.*, share and share alike, for ever; but in case *B.* have no issue, then to hold to *B.*, his heirs and assigns for ever.

Held, that *B.* took an estate in tail general. *Doe dem. Burrin* v. *Charlton.* 429

DIRECTORS.

See JOINT STOCK COMPANY, 5.

DISCLAIMER.

I. *Of title in landlord, by tenant.* *See* 142. n.

1. *A.* took premises of *B.*, with an agreement, for a lease for seven years, or for the lease for lives under which *B.* held the property. *B.* subsequently assigned his interest in the premises to *C.* *C.*'s attorney, under an impression that the seven years had expired, demanded possession from *A.* *A.* said, "I hold on lives, and as long as they live I will hold the premises; you know I have an agreement." The attorney then de-

manded a quarter's rent which was due, but *A.* refused to pay it, saying, "I hold under *B.*, and I was directed by him to pay *D.* (who was the superior landlord) and I will do so; for how do I know he will not make a demand on me?" Held, no disclaimer of the title of *C. Doe dem. Williams and Another* v. *Cooper.* Page 135

II *Of title in himself, by trespasser.*
See 225. n.

III. *Of interest in premises for which an ejectment is brought, by person served with a declaration.*
See COSTS, 15.

DISPENSATION WITH PERFORMANCE. 173. n. 176. (*a*).

DISTRESS,
See AVOWRY.

I. *At what time to be taken.*

1. Within six months after tenancy determined. 651. n.

II. *Impounding, when complete.*

2. Cattle being distrained upon in a particular close, the distrainor leaves a note, stating their number, with the distrainee, and on the following morning delivers to the distrainee a notice of distress, in which he states, that he has distrained upon the cattle, and has "impounded them in the place or places hereunder mentioned;" which notice concludes thus, "an inventory of the cattle, &c. distrained upon, *and the same are impounded upon the premises.*" Held, that the impounding was complete, as against a tender subsequent to the notice; *hæsitantibus Bosanquet* and *Erskine* JJ.; *Maule* J. *dissentiente. Thomas* v. *Harries.* Page 695

DISTRINGAS.

I. *Ad attornandum.*
See 129. (*a*).

II. *Ad respondendum.*

1. On a motion to discharge a rule obtained for a distringas to compel an appearance, the affidavits, on which such rule was granted, must be brought before the court. *Cooper* v. *Folkes.* 942

DIVORCE.

I. *How proved.*

1. A *Jewish* divorce cannot be proved without producing the document of divorce delivered by the husband to the wife, per *Erskine* J. *Moss* v. *Smith.* 228

II. *Effect of,*

2. *Quære* whether by such a divorce the civil *status* of the parties is altered. *Ibid.*

DOUBLE COSTS.
See COSTS, 4.

DOWER.
See ACKNOWLEDGMENT.

DUBLIN.

1. Custom of foreign attachment in, See *Ferguson* v. *Spencer*, 987. 990.

2. Administration granted in,
See ADMINISTRATION, 1.

DUCHY MANOR.
See LANCASTER.

ECCLESIASTICAL COURTS.

See ADMINISTRATION.
DEFAMATORY WORDS.
PROHIBITION.

EJECTMENT.

See EVIDENCE, 2.

I. *Title of the lessor of the plaintiff.*

1. A declaration by an under tenant that he holds under *A.* the lessee, and that he was directed by *A.* to pay the rent to *A.*'s lessor, and that he would do so, is not such a disclaimer of the title of *A.*'s assignee of the term, as will entitle that assignee to maintain ejectment against such under tenant. *Doe dem. Williams and Another.* v. *Cooper.* Page 135

2. The defendant, who was one of the canons of *Windsor*, demised by way of mortgage for ninety-nine years, if he should so long live and continue a canon, to the lessor of the plaintiff, "all that the canonry of him the said *R. A. M.* of the Queen's free chapel of *St. George* at *Windsor*, and all glebe and other lands, *messuages*, tenements, and hereditaments, belonging thereto; and all and every the rights, rents, profits, emoluments, privileges, advantages, and appurtenances to the said canonry belonging.

On ejectment brought on the demise of the mortgagee, it appeared in evidence, that there was no property attached to any individual canonry, but that the whole property belonged to the dean and chapter (*a*); and that the surplus rents, after payment of certain expenses, were divided equally among the dean and the other members of the chapter; that all the canons had houses assigned to them for their residence, but that no particular house was appropriated to any one canonry; that whenever a vacancy occurred, the canons had a right of choice of the vacant house according to their seniority, and that the house which was left after the other canons had made their selection was assigned to the new canon; that the defendant had retained possession of the same house which was assigned to him upon his installation.

Held, that ejectment would not lie, either for the canonry, or for the house assigned to the defendant for his residence as canon. *Doe dem. Butcher* v. *Musgrave.* Page 625

3. Held also, that the defendant was not estopped by the indenture of mortgage, from shewing that the house in question did not belong to the canonry. *Ibid.*

II. *Service of declaration.*

4. Where the tenant in possession had rendered the premises inaccessible, and had evaded personal service of a declaration in ejectment, service by leaving the declaration at the counting-house of such tenant, was held sufficient. *Doe dem. Barrow* v. *Roe.* 238

(*a*) *Vide post.* 1051. (*a*).

5. Where a rule for judgment in ejectment against the casual ejector is served on persons who appear, and shew that they are not in possession, and make no claim to the premises, they are entitled to the costs of being brought before the court. *Doe dem. Tansley and Others* v. *Roe.* Page 490

6. To obtain judgment against the casual ejector, it is not sufficient that the declaration, served on a member of the family of the tenant in possession, came into the hands of such tenant before the first day of the term, unless evidence that the declaration reached the hands of the tenant, was in the possession of the lessor of the plaintiff early enough to enable him to move for judgment on the first day of term. *Doe dem. Emsley* v. *Roe* (Argent). 840

III. *Effect of judgment and writ of habere facias possessionem, against casual ejector.*

7. Whether the service of a declaration in ejectment upon one of several subtenants of a lessee, followed by judgment against the casual ejector, executed against that subtenant, is evidence of an election on the part of the lessor, to avail himself of a clause of re-entry contained in the lease, *quære*. *Long* v. *Bilke.* 87

ELECTION.

See EJECTMENT, 1. 7.

EQUITY.

See PENAL ACTION, 2.

ERROR.

See 792. (*a*). BAIL IN ERROR.

I. *To what court writ of error lies.*

1. A writ of error lies from inferior courts of record into the Common Pleas as well as into the King's Bench. Page 2. n.

II. *Record in, how constituted.*

2. Made by mouth of recorder of *London.* 539. (*b*)

III. *What errors may be insisted on.*

3. A plaintiff in error who has assigned error in fact, to which *in nullo est erratum* is pleaded, may insist upon errors of law, apparent on the record, and stated in the margin of the paper books. *Bruce* v. *Wait.* 1

ESTATE.

See PLEADING, 10.

TENANCY.

I. *In tail general.*

1. By a will made before the 7 *W.* 4. and 1 *Vict. c.* 26. *s.* 9., *A.* devised to *B.* for life, remainder to the eldest son of *B.*; but for want of such issue, then to the daughter or daughters of *B.*, share and share alike, for ever; but, in case *B.* have no issue, then to hold to him, his heirs and assigns for ever. *B.* takes an estate in tail general. *Doe dem. Burrin* v. *Charlton.* 429

II. *In special tail.*

See DEVISE, 2.

ESTOPPEL.

See EJECTMENT, 3.

I. *Tenancy by,*

See 126. (*b*).

EVIDENCE.

And see AGREEMENT, 2. BILLS AND NOTES, 1. 5. DIVORCE, 1. LEASE, 1. PARTNER, 3. WITNESS.

I. *Parol evidence, to control contract by deed.*

1. Where land in the possession of a tenant for years, is conveyed by deed, the right of the purchaser, as assignee of the reversion, to receive the whole rent for the current quarter, cannot be controlled by a contemporaneous parol agreement, to apportion the quarter's rent between the assignor and assignee. *Flinn* v. *Calow.* Page 589

II. *Relevancy of evidence.*

See TRESPASS, 1.

III. *Improper admission of evidence, effect of,*

See 358. *Ibid.* note (*b*).

IV. *Inrolment in Chancery, how proved.*

2. Under the mortmain act of 9 *G.* 2. *c.* 36., the production of an indenture having an indorsement, which purports to be a memorandum of the inrolment of the indenture in chancery on a certain day, and to be signed by a party who is shewn to have acted as clerk of the inrolments, though not so designated in the indorsement, is sufficient proof of the inrolment, and of the time at which it took place, without proof of the handwriting of the officer signing the memorandum. *Doe dem. Williams and Others* v. *Lloyd.* Page 761

EXCHEQUER BILLS.

I. *Effect of possession of,*

1. *A.*, in *South America*, remits to *B.* in *London*, with directions to invest the amount in exchequer bills, and to hold the exchequer bills, when purchased, upon *A.*'s account. *B.* having purchased the exchequer bills in his own name, places them in a box, which he locks and deposits with his banker, *C.* Interest becoming due, and it being necessary to exchange the exchequer bills for new ones, *B.* takes the exchequer bills from the box, and delivers them to *C.* for that purpose. The interest being received and the exchequer bills exchanged, *C.* credits *B.*'s account with the interest, and in the course of a week or two delivers the renewed exchequer bills to *B.*, who locks them up in the box. The exchequer bills are not entered in *B.*'s pass-book, nor are they noticed in any of *C.*'s books. After one of these exchanges of exchequer bills, and before the renewed exchequer bills are received by *B.* from *C.*, or deposited in the box, *B.*'s account with *C.* becomes overdrawn, *C.* having no notice that the exchequer bills belong to *A.*, or that they are not the property of *B.* *C.* has no lien upon the exchequer bills for the

balance of *A.*'s banking account. *Brandão* v. *Barnett.* Page 908

2. Whether *C.* would have had a lien for such balance, if the exchequer bills had been the property of *A.*, *quære.* *Ibid.*

EXETER.

Foreign attachment in, 41. (*a*)

FAILURE OF ISSUE.

See ESTATE, 1.

FALSE IMPRISONMENT,

See JUSTICE OF THE PEACE, 6, 7, 8, 9, 10, 11, 12, 13.

TRESPASS, 1. 224. (*b*).

FALSE JUDGMENT,

In court of antient demesne. 41. (*a*)

FEIGNED ISSUE.

See TITHES, 1.

FELONY.

See 261. (*c*). 541. n. 775.

FIFTEENTH.

Proceedings upon a seizure of wool for non-payment of. *Gervays* v. *Kerr.* 549. n.

FINES AND RECOVERIES.

I. *Amendment of,*

1. Lands of which a recovery was intended to be suffered, lay in the several parishes of *A.* and *B.* in the county of *M.* The parish of *A.* only was mentioned in the record of the recovery; but in the deed to make a tenant to the præcipe and to lead the uses of the recovery, "all the lands of the recoveree in the parish of *A.* in the county of *M.*, and all other her lands in the county," were conveyed.

The court refused to amend the recovery, holding that the omission of the parish of *B.* was cured by the eighth section of the act for the abolition of fines and recoveries, 3 & 4 *W.* 4. *c.* 74. *Heming, demandant; Griffithes, tenant; Best and Wife, vouchees.* Page 879

II. *Acknowledgment of deed by married woman.*

See ACKNOWLEDGMENT, 1.

III. *Dispensation with concurrence of husband.*

2. To ground an application under 3 & 4 *W.* 4. *c.* 74. *s.* 75., to enable a wife to convey, there must be an affidavit from her shewing her concurrence; and if the husband do not join, his non-concurrence must be accounted for by affidavit. *Mary Williams, In re.* 881

And see RIGHTS, WRIT OF.

FORCIBLE ENTRY.

I. *What shall amount to,*

1. Though a tenant remain wrongfully in possession after the expiration of his term, the landlord cannot expel him by force, in order to regain possession. *Newton et ux.* v. *Harland and Another.* 611

2. *Semble,* that possession so acquired is not sufficient to vest the possession in the landlord with

relation to the termination of the term. *Newton et ux.* v. *Harland and Another.* Page 644

FOREIGN ATTACHMENT.

I. *What customs good.*

1. A custom to issue process of attachment for the purpose of compelling the appearance of the defendant, without a previous summons, is bad. *Bruce* v. *Wait.* 1

II. *Practice upon,*

2. A record, by which it appears that an attachment issued upon a plaint, without a summons, and return of *non est inventus et nihil habet*, is erroneous. *Ibid.*

3. The claimant of the goods attached, against whom it has been considered that judgment be entered for the plaintiffs (for whom a verdict had been found on an issue taken upon a counter-plea of the claim), may bring a writ of error, although the original defendant has not appeared. *Ibid.*

4. *Quære*, Whether the adding the similiter by the party who takes an issue, is a "joining of issue," within 21 *Jac.* 1. *c.* 28. *s.* 2. *Ibid.*

5. *Quære*, whether the entry of a claim to the goods attached is tantamount to an arrest, or an appearance, from which the six weeks, for joining issue, are to be calculated *Ibid.*

IV. *Judgment of goods*, 12. 41. (*a*).

V. *Execution for the plaintiff*, 41. *a.*

VI. *Recovery, how pleaded*, 35.

FOREIGN JUDGMENT.

See Page 882.

FRANCHISE.

1. Seized into the king's hands for malfeasance of lord of franchise, and by him replevied. 541. n.

FRAUDS, STATUTE OF.

I. *Cases within the fourth section.*

1. Where contract not to be performed within a year. 366. n.

II. *Cases within the seventeenth section.*

2. Under a plea of *nunquam indebitatus*, in debt for goods bargained and sold, it is open to the defendant to take the objection that the contract is void under this section. *Fricker* v. *Thomlinson.* 772

3. But, *semble*, that the objection is answered by shewing an acceptance and actual receipt of part of the goods, even *after* action brought. *Ibid.*

FRIENDLY SOCIETY.

See BENEFIT SOCIETY.

GAMING.

See PLEADING, 8.

GAOL, REGULATIONS OF.

See PRISONER.

GUARANTEE.

See STAYING PROCEEDINGS, 2.

HABEAS CORPUS, Page 19. 21.

HABERE FACIAS POSSESSIONEM, 88.

And see EJECTMENT, III.

HIGHWAY.

See WAY.

HOC PARATUS EST VERIFICARE,

See VERIFICATION, 1.

HOLIDAY.

See PRACTICE, 8.

HOMINE REPLEGIANDO.

See 541. n.

HORNING,

Process of, 891

HORSES.

See INFANCY, 3.

HOUSES.

See CASE, ACTION ON THE, 1.

HUNDRED COURT, 546. (*b*).

HUSBAND.

See BARON AND FEME.

IDENTITY.

I. *Of close.*

See TRESPASS, 5.

II. *Of goods.*

See TROVER, 2.

IMPOUNDING.

I. *Impounding on the demised premises, at what period complete.*

1. A bailiff having distrained upon cattle, leaves with the distrainee a note, stating their number. On the following morning he delivers to the distrainee a notice, stating, that he has distrained upon the cattle, and has "impounded them in the place or places hereunder mentioned;" which notice concludes thus, "An inventory of the cattle, &c. distrained upon, and the same are impounded upon, the premises."

Held, that the impounding was complete, as against a tender of rent and costs, subsequent to the notice. *Per Tindal* C. J. *hæsitantibus Bosanquet* and *Erskine* JJ. *Maule* J. *dissentiente. Thomas* v. *Harries.* Page 695

INDUCEMENT, MATTER OF, 282. n.

INFANCY.

I. *Infant, when bound.*

1. Not bound by account stated by him, except it be taken before auditors appointed in a court of record. 551. (*b*)

2. Infant may bind himself by single bill. *Ibid.*

II. *Necessaries.*

3. Upon a replication of necessaries to a plea of infancy, in an action for the hire of horses, saddles, and harness, the question, whether necessaries or not necessaries, is a

question of fact for the jury. *Harrison* v. *Fane.* Page 550

4. But where, upon such an issue, it appeared that the defendant was an *Oxford* student, and the plaintiff gave no evidence that the horses, &c. were necessaries, except that the defendant himself kept a horse, and occasionally hunted with his father, a man of property, who kept hounds, and the judge told the jury that he was of opinion that the plaintiff was not entitled to recover,—the court set aside a verdict for the plaintiff, and granted a new trial without costs, considering the verdict to be perverse. *Ibid.*

5. So, although the verdict was for less than 20*l.* *Ibid.*

INFERIOR COURT.

I. *Practice in,*

1. *Quære,* whether the adding of the similiter by a plaintiff who takes issue on the defendant's plea, is a joining of issue, within 21 *Jac.* 1. *c.* 23. *s.* 2. *Bruce* v. *Wait.* 1

INFORMATION.

See JUSTICE OF THE PEACE, 2.

INJUNCTION, 280. 309. (*a*), 323. (*a*).

INMATES,

Who to be considered as, 486. (*c*).

INNKEEPER.

See BANKRUPT.
COVENANT, 7.

INROLMENT.

I. *Of attorneys.*

See ATTORNEY, 9.

II. *Of deeds.*

See EVIDENCE, 2.

INSTALMENTS, Page 308. n.

INSTRUMENTS, LEGAL.

To be pleaded according to their legal effect. 281. (*d*).

INSURANCE.

I. *Interest in subject insured.*

1. *A.*, a manufacturer, contracts with *B.*, *C.*, and *D.*, who are partners occupying a mill, the property of *B.*, for the drying of *A.*'s wool in a room in the mill. *B.*, *C.*, and *D.* effect an insurance on the mill, covering wool in the room. *D.* retires from the partnership, after which *C.* and *D.* have no interest in the room. *B.* and *C.* effect another insurance, also covering goods in the room. A dissolution of partnership takes place between *B.* and *C.*, which is not communicated to *A.* *C.* afterwards effects a similar insurance in his sole name, and *A.*'s wool being damaged by fire, the insurance office pay the proceeds of the damaged wool to *A.*, and the amount of loss on the wool, to the extent of the sum insured thereon, to *C.* Similar losses had been paid by the insurance office to the partnership, and by the partnership paid over to *A.* under the former

policies: Held, that as it was not shewn that *B.* had authorised the effecting of the then policy, or that the partnership was bound to insure, an action for money had and received could not be maintained by *A.* against *B.* and *C.* jointly. *Armitage* v. *Winterbottom and Another.* Page 130

II. *Assignment of policy.*

See BANKRUPT, IV.

INTEREST OF MONEY.

See EXCHEQUER BILLS.

I. *Right of creditor to,*

1. Annuitant delayed by injunction, where entitled to, 323. (*a*).
2. By a contract of sale, the purchaser is to pay a certain sum by six instalments, and also 5 per cent. half yearly from the day appointed for the payment of the second instalment, upon the four remaining instalments until paid; such additional sums by way of per-centage to be secured by the bond of the purchaser. In the contract, and also in the declaration thereon, this additional per-centage is called "interest" upon the instalments. Neither the instalments nor the additional per-centage are paid as they become due, nor is any bond given: Held, that the purchaser is chargeable with interest upon the last four instalments until actual payment of those instalments; but that the jury are not bound, either at common law or under 3 & 4 *W.* 4. *c.* 42. *s.* 28., to give interest upon the additional per-centage treated by the parties as "interest." *Attwood* v. *Taylor.* Page 280
3. Ruled at nisi prius, that a plaintiff cannot, for the purpose of excusing his apparent laches in deferring his action for several years, give in evidence an order for an injunction obtained by the defendant in a suit in equity instituted by the defendant against the plaintiff, by which order the plaintiff was restrained from suing during the whole of that period, without producing the bill and answer. Per Lord *Abinger* C. B. *Tamen quære. Ibid.*
4. Statutory liability of lender to refund, 325. (*a*).
5. Compound interest. 297. (*b*).

II. *How recoverable.*

6. By mortgagee. 298. (*a*).
7. Upon calls.

See JOINT STOCK COMPANY, 6, 7, 8.

INVENTORY.

See IMPOUNDING.

I. O. U.

I. *Effect of,*

1. The production by a plaintiff of an "I. O. U.," signed by the defendant, but not addressed, is *primâ facie* evidence that it was given to the plaintiff by the defendant. *Curtis* v. *Rickards.* 46
2. And if the latter wishes to rebut the inference arising from its production by the plaintiff, he should shew that it has been in the hands of some other party. *Ibid.*

IRELAND.

I. *Administration granted in,*
See ADMINISTRATION.

II. *Bankruptcy in,*
See BANKRUPT.

III. *Replevins in,* 577. (*b*).

IRREGULARITY.

I. *When waived.*
See PRACTICE, 16.

ISSUABLE PLEA.

See ADMINISTRATION, 1.

ISSUE.

I. *Joinder of,*

1. Within 21 *Jac.* 1. *c.* 21. *s.* 2. *Bruce* v. *Wait.* Page 1

II. *Delivered.*
See AMENDMENT, 1.

III. *Feigned,*
See TITHES, 1.

IV. *Failure of.*
See ESTATE, 1.

JEWISH MARRIAGES AND DIVORCES, 232. (*b*).

JOINT STOCK BANK.

See BILLS AND NOTES.

JOINT STOCK COMPANY.

See AMENDMENT, 1.

I. *Construction of statutes regulating,*

1. An act incorporating a joint stock company directs that the company shall from time to time cause the names, additions, and places of abode of the several persons entitled to shares in the undertaking, with the number of shares which they are respectively entitled to hold, and the amount of subscriptions paid thereon, and the number by which each share shall be distinguished, to be entered in a book to be kept by the secretary of the company; and that in an action for calls, the production of the book in which the secretary is directed by the act to enter and keep a list of the names, additions, and places of abode of the several proprietors of shares, with the number and shares which they are respectively entitled to hold, shall be *primâ facie* evidence to prove the defendant a proprietor, and the number and amount of his shares.

Held, that the provisions of the act as to the mode of keeping the book, are directory only. *Southampton Dock Company* v. *Richards. The same* v. *Arnett.* Page 448

2. In an action against *A.* for calls, it is therefore no objection to the admissibility of the book, produced as the book kept under the act, to prove him a proprietor, that an irregularity or omission is shewn to exist with respect to the entries in the book relating to other shareholders. *Ibid.*

3. Such an enactment does not require that the entries should be made by the secretary with his own hand. *Ibid.*

4. An act incorporating a joint stock company, directs that the directors of the company shall keep a regular minute and entry

of the orders and proceedings of every meeting of the directors, which shall be signed by the chairman at each respective meeting, and that the minutes and entries of the respective meetings, when so signed, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence without proof that the meetings were duly convened, or that the persons making or entering such orders or proceedings were proprietors or directors of the company. Held, that signature of the minutes of the meeting by the chairman at the *following* meeting at which the same chairman presides, is sufficient. *Southampton Dock Company* v. *Richards. The same* v. *Arnett.* Page 448

5. A statute gave power "to the directors" of an incorporate joint stock company to make calls: Held, that the power might be exercised by "the court of directors," the statute appearing to treat the terms "the directors" and "a court of directors" as equivalent expressions. *Ibid.*

6. Where a statute empowers a joint stock company, in actions for calls, to declare and allege that the defendant, being a proprietor of so many shares, is indebted to the company in such sums of money as the calls in arrear amount to, for so many calls of such sums of money upon so many shares belonging to the defendant, whereby an action hath accrued to the company by virtue of the act, without setting forth the special matters, and that, on the trial of such action, it shall only be necessary to prove that the defendant, at the time of the making of such respective calls, was a proprietor of such shares as such action is brought in respect of, and that such calls were in fact made, and that notice thereof was given as directed by the act, without proving the appointment of the directors who made such call, or any other matter whatsoever, and that the company shall thereupon be entitled to recover what shall appear due, including interest at 5 per cent., the proper course is, for the company to declare for the bare amount of the calls, and for the jury to add the interest (*quære*, as debt or as damages). *Southampton Dock Company* v. *Richards. The same* v. *Arnett.* Page 448

7. It is not necessary to insert a count for interest. *Ibid.*

8. Nor ought the amount of the interest to be added by the plaintiffs to the calls, and declared for as part of the calls. *Ibid.*

II. *Rights of members, inter se.*

Vide suprà, 6, 7, 8.

9. *A.* entered into a contract, with a committee of persons associated for the purpose of obtaining an act of parliament for making a turnpike road, to do certain work for a specified sum. *A.* afterwards became a subscriber for two shares. He is not thereby precluded from recovering upon the contract. *Lucas* v. *Beach, Bart.* 417

JUDGMENT.

I. *Interlocutory,*

See MONEY BROUGHT INTO COURT, 3.

II. *As in case of a nonsuit.*

1. There can be no rule for judgment as in case of a nonsuit when the cause is not completely at issue, although it may have been at issue at a former period. *Rickards and Ux* v. *Middleton.* Page 53
2. Where therefore the plaintiffs, after giving notice of trial, had withdrawn the record, and afterwards amended their replication, to which the defendant had delivered a fresh rejoinder, concluding to the country, but no surrejoinder had been delivered, the court discharged a rule obtained by the defendant for judgment as in case of a nonsuit. *Ibid.*
3. Where issue is joined in *Michaelmas* vacation, and no notice of trial is given, the defendant is not entitled to move for judgment as in case of a nonsuit until *Trinity* term. *Duggan* v. *Wilbraham.* 420
4. A motion for judgment as in case of a nonsuit made in *Trinity* term, is too early where issue had been joined (in a town cause) in *Hilary* vacation, though upon a rule drawn up as of *Hilary* term. *Doe dem. Balls* v. *Margrave.* 334
5. In shewing cause against a rule *nisi* for judgment as in case of a nonsuit, it is not necessary that the affidavit should state that plaintiff has a good cause of action. *Faulkner* v. *Whittall.* Page 472
6. Where a defendant who had become insolvent after action brought, refused to accept a *stet processus,* the court discharged a rule *nisi* for judgment as in case of a nonsuit, although plaintiff had given notice of trial after he had become apprised of the insolvency. *Ibid.*
7. Where the defendant in *Hilary* term obtained a rule *nisi* for judgment in case of a nonsuit, which was discharged on the plaintiff's agreeing to give a peremptory undertaking to try at the sittings after the term, but the rule containing the peremptory undertaking was not drawn up until the 13th of *March,* which was after the time to which it referred had expired, and the defendant in *Easter* term obtained a rule absolute, in the first instance, for judgment as in case of a nonsuit, the court set such judgment aside for irregularity. *Gingell* v. *Bean.* 50
8. Where both parties had become insolvent since action brought, the court intimated that they would discharge a rule *nisi* for judgment as in case of a nonsuit unless the defendant would consent to a *stet processus. Ibid.* 555
9. The court will not discharge a rule for judgment as in case of a nonsuit, without a peremptory undertaking, upon the ground of the insolvency of the defendant, unless it distinctly appear that the

plaintiff first knew of the insolvency, after action brought. *Smith* v. *Davies.* Page 961

10. So, although the plaintiff offer to consent to a stet processus. *Ibid.*

III. *Non obstante veredicto.* 792

IV. *Quod defendens se attornet.* 129

V. *Judgment of goods, upon a counter-plea to a claim of goods attached.* 12. 41. n.

VI. *Plea of judgment recovered.*

See 238. (*a*).

11. The plaintiff and the defendant agreed that the former should give up to the latter a business which they had carried on in partnership, in consideration of the plaintiffs receiving from the defendant a promissory note for 730*l.*, payable by instalments; and it was further agreed, that in case a certain mortgage of 2000*l.* on the plaintiff's property should be called in before the note was paid off, the defendant should immediately pay the balance remaining due on the note, or find a like mortgage, free of expense, to the plaintiff. The plaintiff (after the mortgagees had called in the mortgage, but before the same was paid off) brought an action in the Exchequer on the agreement, alleging for breach the nondelivery of the note, which action terminated under a judge's order by the defendant giving the plaintiff (among other things) a note for 505*l.* The plaintiff having brought a second action in this court upon the agreement, in which the breach assigned was, that although the mortgage money had been called in the defendant had neither paid the balance due to him nor provided a fresh mortgage, whereby the plaintiff had been put to great expense in procuring the loan from other parties: Held, that a plea which set up the recovery in the former action, afforded no answer to the declaration, the former action having been brought for a different breach of the agreement. *Bristowe* v. *Fairclough.* Page 143

VII. *Foreign judgment.*

See 882.

JUSTICE OF THE PEACE.

I. *Powers of justices.*

1. Where the town council have required, from a removed ministerial or executive officer of the borough, the delivery up of goods of the body corporate in his possession, he may, in case of refusal, be proceeded against by summary conviction before the justices of the borough, in the manner pointed out in the sixtieth section. *Baylis* v. *Strickland.* 591

2. The borough justices have jurisdiction, upon an information laid before them, in which such an offence is charged. *Ibid.*

3. And where the conviction upon such an information is still subsisting, and is not void, *ex facie*, neither the justices nor the officer who executes the warrant of commitment issued by them in pur-

suance of such conviction, can be sued as trespassers. *Baylis* v. *Strickland.* Page 591

4. When such a conviction has been quashed upon appeal, the party aggrieved by a commitment under the justices' warrant may, under 43 *G.* 3. *c.* 141., bring an action on the case against the magistrate. *Ibid.*

5. But he cannot maintain trespass. *Ibid.*

6. A magistrate who commits when he has no jurisdiction, is liable in trespass. *Fernley* v. *Worthington.* 491

7. But where, supposing the facts alleged to be true, the magistrate would have jurisdiction, his liability to be sued, or his exemption from such liability on the ground of jurisdiction, cannot be affected by the truth or falsehood of the facts, or by the sufficiency or insufficiency of the evidence adduced to establish them. *Cave* v. *Mountain.* 257

And see BOROUGH.

II. *Liability of,*

Suprà, 4, 5, 6, 7.

8. Held, that knowledge on the part of the committing magistrate, that the prisoner will be subjected to restrictions unnecessarily severe in the gaol to which the commitment is made, does not make the magistrate a trespasser, unless he expressly direct such treatment to be adopted in the particular case. *Ibid.*

9. An information brought before a magistrate which charges an offence within his cognizance, is sufficient to give the magistrate jurisdiction, and to protect him in an action for false imprisonment, although the information disclose no legal evidence against the alleged offenders, and even although it purport to be founded upon inadmissible hearsay evidence. *Cave* v. *Mountain.* Page 257

10. In a case where the period for which a party has been committed for further examination appeared to the court to be too long, yet the jury, having, to the satisfaction of the judge at nisi prius, found that the detention was not excessive, a rule nisi for a new trial was refused. *Ibid.*

11. In an action by *A.* against *B.* for false imprisonment, *B.* cannot defend himself under a magistrate's warrant against *C.*, although *A.* was charged with felony before the magistrate, and was the person against whom the warrant was intended to issue. *Hoye* v. *Bush.* 775

12. A demand of a perusal and copy of the warrant is, in such case, unnecessary. *Ibid.*

III. *Pleading by*, 246. 257 (*a*).

LACHES.

See BILLS AND NOTES, 7.
INTEREST, 8.

LANCASTER, DUCHY OF,

584. (*a*), 589 n. 685.

LANDLORD AND TENANT.

See DEMISE.

I. *Relation, how constituted.*

1. *A.*, after mortgaging in fee to *B.*, demises to *C.* for years from *Lady-day* at a quarterly rent. *A.* afterwards sells the equity of redemption, in parcel of the mortgaged premises, to *B.* *B.* in *August* gives notice of the mortgage, and requires *C.* to pay to himself and not to *A.* rents then due, or thereafter to become due from *C.* in respect of the mortgaged premises. *B.* then enters upon the parcel sold. In *December* *C.* tenders to *B.* three quarters' rent upon the lease at *Michaelmas*, which *B.* refuses to accept. Held, that this notice was sufficient to establish the affirmative of an issue taken upon an allegation that *B.* demised to *C.* for one year from the date of the notice. *Browne* v. *Storey.* Page 117

2. The judge having told the jury that by that notice alone *C.* became tenant to *B.*: Held, that it was no ground of objection to the judge's direction that he omitted to leave it to the jury to say whether *C.* assented to the proposal of a demise involved in the notice, it not having been requested that this question should be so left. *Ibid.*

3. The defendant took premises of one *H.* at a yearly rent, with an agreement for a lease for seven years, or for the lease for lives under which *H.* held the property. *H.* subsequently assigned his interest in the premises to the lessors of the plaintiff and their attorney, under an impression that the seven years had expired, and demanded possession. The defendant said, "I hold on lives, and as long as they live I will hold the premises; you know I have an agreement." The attorney then demanded a quarter's rent which was due; but the defendant refused to pay it, saying, "I hold under *H.*, and I was directed by him to pay *K.* (who was the superior landlord), and I will do so; for how do I know he will not make a demand on me?" Held, no disclaimer of the title of the lessors of the plaintiff. *Doe dem. Williams and Another* v. *Cooper.* Page 135

II. *Determination of relation.*

See FORCIBLE ENTRY, 1, 2.

LAST-MENTIONED.

Whether necessarily referred to the next antecedent. 724

LAUNDRESS.

See 276.

LEASE.

See DEMISE. LANDLORD AND TENANT.

I. *Clause of re-entry.*

1. Whether the service of a declaration in ejectment upon one of

several subtenants of a lessee, followed up by judgment against the casual ejector, executed against that subtenant, is evidence of an election on the part of the lessor, to avail himself of a clause of re-entry contained in the lease, *quære*. *Long* v. *Bilke*. Page 87

LETTERS OF ARRESTMENT, AD FUNDANDUM JURISDICTIONEM.

1. By whom granted. 42. n.
2. Practice upon, 885.

LETTERS PATENT.

1. Empowering unincorporated company to sue and be sued in name of their officers. 251. n.
2. Notice of objection to, 249. (*a*).

LIBEL.

I. *Defamatory,*

1. On the trial of an action for a libel published in a newspaper, the plaintiff was allowed to give in evidence a second paragraph subsequently published in the same paper, in which the libellous charge was re-asserted, for the purpose of shewing the defendant's intention; and in leaving the case to the jury, the judge told them to take the two paragraphs with them, and to give the plaintiff such damages as they considered him entitled to under the circumstances. An application for a new trial, on the ground of misdirection, was refused. *Barwell* v. *Adkins*. 807

II. *Libel, in ecclesiastical court.* *See* 519. (*a*).

LIBERTY OR FRANCHISE.

Seized and replevied. Page 541. n.

LIEN.

See ATTORNEY, III.

I. *How made available.*

1. Lien may be given in evidence under a plea of "not possessed." *Brandão* v. *Barnett*. 908

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

LIVERPOOL.

1. Custom of foreign attachment, in Passage Court of, 41. (*a*).

LONDON.

I. *Sheriffs.*

1. Their judicial functions. 545. n.
2. Their ministerial functions. *Ibid.*
3. Consequences of the death of one sheriff. *Ibid.*
4. Their secondaries. *Ibid.*

II. *Customs of London.*

5. How certified. 539. (*b*).
6. Record in error, how made. *Ibid.*

MAGISTRATE.

See JUSTICE OF THE PEACE.

MALICE. 224. (*b*).

See TRESPASS, 1, 2.

MANDAMUS.
I. *For examination of witnesses.*
See 95.

MANOR. *See* 546. (*b*).
I. *Custom of,*
See 39. (*a*).
II. *Courts.*
See 546. (*b*).
III. *Within duchy of Lancaster.*
See 584. (*a*). 589. n. 685.

MAP. *See* 358. (*a*).

MARRIAGE.
See DIVORCE.
PROHIBITION.

MASTERS OF THE COURT.
I. *Reference to a master.*
See PRACTICE, IV.

MAYOR.
See BOROUGH, 5.

MEMORANDUM. Page 737.

MESNE PROFITS,
How estimated. 312. n.

METHODIST CHAPELS,
Form of conveyance of land for erecting, 673*

MIDDLESEX,
I. *Sheriffs of,*
1. Shrievalty of, granted to city of *London.* 544. n.
2. ————, in suspense on death of one sheriff. 545. n.
3. Under-sheriff of. *Ibid.*
II. *County court of,*
See COUNTY COURT, 1.

MINERALS.
See MINES

MINES.
I. *Possession of, how proved.*
1. Where mines are demised as mines and minerals lying under certain lands, which lands are in fact a long continuous tract of waste, proof of workings under one part of the waste are evidence of possession of the whole subject of the demise. *Taylor* v. *Parry and Others.* Page 604
And see POSSESSION, 1, 2, 3.

MISDIRECTION.
See 46. 77. 83, 84. 117. 124. 130. 133. 137. 228. 234. 279. 306. 333. n. 347. 359. 361. 368. 392. 511. 516. 568. 571. 710. 717. 747. 751. 796. 807, 808. 962. 964. 981. 984.

MISE,
Evidence receivable, upon joinder of the, 480. (*a*).

MODEL-DEED.
Referred to, in conveyances of land for erection of Methodist chapels. 673*

MODO ET FORMA,
What to be proved under, 126. (*b*).

MODUS.
See CONSOLIDATION OF ACTIONS, 1.

MONEY BROUGHT INTO COURT.

I. *How pleaded.*

1. A plea of payment of money into court under 3 & 4 *W.* 4. *c.* 42. *s.* 1. and *R. T.* 1 *Vict. reg.* 17., in bar of the further maintenance of the action, cannot be pleaded to the same cause of action to which other pleas are pleaded in denial of the existence of that cause of action at the time of action brought. *Thompson* v. *Jackson.* Page 242

II. *Effect of,*

2. In special assumpsit upon a contract of sale, the defendant pleaded payment of money into court, and *non damnificatus ultrà. Quære,* whether the defendant can give the contract in evidence for the purpose of shewing a partial defeasance in another part of the contract not set out in the declaration, and prove that the circumstances, by which the contract was to be so partially defeated, have arisen. *Attwood* v. *Taylor.* 280

III. *How paid out.*

See BAIL IN ERROR, 1.

3. Money is paid into court by a defendant, who dies before verdict or interlocutory judgment; whereby the suit abates. The money can be paid out of court only to the personal representative of the defendant. An application on the part of his attorney will not be entertained. *Palmer* v. *Reiffenstein.* 94

MONEY HAD AND RECEIVED.

I. *When maintainable.*

See PARTNER, 4.

1. Pending an action by *A.* against *B.*, *A.* is served with notice of *B.*'s intention to sue for certain statutable penalties incurred by *A.* An arrangement is made, under which *A.*'s action is discontinued, and *B.* receives from *A.* 50*l.* towards the costs of *B.*'s defence in that action. *A.* may recover back the 50*l.* as money received by *B.* to *A.*'s use, if the 50*l.* is found to have been paid with reference to, and by the coercion of, the threatened penal action, and not to have been paid voluntarily, and with reference to *A.*'s action only. *Unwin* v. *Leaper.* Page 1

So, although the arrangement contain terms to be performed, and which are performed, by *B.*, the performance of which prevents *B.* from being restored to his original position, otherwise than by the intervention of a court of equity. *Ibid.*

2. A dispute having arisen as to whether the plaintiff was entitled, in respect of 200 shares, to be registered as a shareholder in a railway company, it was arranged between him and the company, that he should deposit 400*l.* with the defendant, at that time the secretary of the company, which sum was to be repaid if the plaintiff failed to make out his claim. The following minute of the transaction was made by the defendant:—

"26th *April* 1838, E. C. R. Company. Memorandum.—Mr. *J. B.* has deposited with me the sum of 400*l.* on account of 200 shares, for which he claims to be registered, on condition that Mr. *B.* is to accept back the money so deposited if he cannot substantiate, to the satisfaction of the board of directors, his claim to be registered for the same. (Signed) *J. C. R.*, secretary."

This sum of 400*l.* was received by the defendant in a cheque, which he paid into his bankers, who carried it to his private account. The defendant quitted the employment of the company in *February* 1839. The plaintiff never was registered in the books of the company as a shareholder: Held, that the action, which was for money had and received, and which was not commenced until more than two years after the money was so deposited, was rightly brought against the defendant. *Baird* v. *Robertson.* Page 981

3. Held also, that the plaintiff was entitled to recover the 400*l.* without shewing that he ever attempted to substantiate his claim to be registered as a shareholder. *Ibid.*

4. *Semble*, that the plaintiff might have immediately abandoned his claim to be registered, and have sued for the money. *Ibid.*

MORTGAGE.

I. *Rights of mortgagee.*

1. Interest upon mortgage, how recoverable. Page 298. (*a*).

2. *A.*, after mortgaging in fee to *B.*, demises to *C.* for years from *Lady-day* at a quarterly rent. *A.* afterwards sells the equity of redemption in parcel of the mortgaged premises, to *B.* *B.*, in *August*, gives notice of the mortgage, and requires *C.* to pay to himself and not to *A.*, rents then due or thereafter to become due from *C.* in respect of the mortgaged premises. *B.* then enters upon the parcel sold. In *December* *C.* tenders to *B.* three quarters' rent, due upon the lease at *Michaelmas*, which *B.* refuses to accept. Held, that this notice was sufficient to establish the affirmative of an issue taken upon an allegation, that *B.* demised to *C.* for one year from the date of the notice.

The judge having told the jury that, by that notice alone, *C.* became tenant to *B.*; Held, that it was no ground of objection to the judge's direction that he omitted to leave it to the jury to say whether *C.* assented to the proposal of a demise involved in the notice; it not having been requested, that this question should be so left. *Brown* v. *Storey.* 117

3. *A.* one of the canons of *Windsor*, demised, by way of mortgage, for ninety-nine years if he should so long live and continue a canon, to *B.*, "all that the canonry of him the said *A.* of the Queen's free chapel of *St. George* at *Windsor*, and all glebe and other lands,

messuages, tenements, and hereditaments belonging thereto; and all and every the rights, rents, profits, emoluments, privileges, advantages, and appurtenances to the said canonry belonging." No property is attached to any individual canonry, but the whole property belongs to the dean and chapter (*a*); the rents are divided equally among the dean and the other members of the chapter; houses are assigned to each canon for his residence, but no particular house is appropriated to any one canonry; whenever a vacancy occurs, the canons have a right of choice of the vacant house, according to their seniority, and the house left after the other canons have made their selection is assigned to the new canon; *A.* retained possession of the same house which was assigned to him upon his installation.

Held, that ejectment on the demise of *B.* against *A.* would not lie, either for the canonry or for the house assigned to *A.* for his residence as canon. *Doe dem. Butcher* v. *Musgrave, Clerk.* Page 625

4. Held also, that *A.* was not estopped by the mortgage deed from shewing that the house in question did not belong to the canonry. *Ibid.*

MORTMAIN ACT.

I. *What a sufficient inrolment under,*

1. Under 9 *G.* 2. *c.* 36. the production of an indenture having an indorsement which purports to be a memorandum of the inrolment of the indenture in Chancery on a certain day, and to be signed by a party who is shewn to have acted as clerk of the inrolments, though not so designated in the indorsement, is sufficient proof of the hand-writing of the officer signing the memorandum. *Doe dem. Williams and Others* v. *Lloyd.* Page 671

II. *Uses, how declared.*

2. The charitable uses to which land is conveyed, may be declared by words of reference to another deed relating to other property. *Ibid.*

MUNICIPAL CORPORATIONS ACT.

I. *Powers of town council.*

1. As to the power given by this Act (*5 & 6 W.* 4. *c.* 76.) by which councils of boroughs are authorised to order borough rates to be made within their boroughs, and for that purpose are to have all the powers which county justices had by virtue of the *55 G.* 3. *c.* 51. for the levying of county rates. *Fernley* v. *Worthington.* 491

2. Under sect. 65. the town council have power to require from a common crier, as a ministerial or executive officer of the borough, the delivery up of the town bell, as part of the goods of the body corporate, such crier having been

(*a*) *Vide post*, 1058. (*a*).

appointed by the old corporation, and having been removed from office upon the election of the council under the act. *Baylis* v. *Strickland.* Page 591

3. And in case of refusal, he may be proceeded against by summary conviction before the justices of the borough, in the manner pointed out in sect. 60. *Ibid.*

MUTUAL PROMISES. *See* 166. 317. (*a*).

NAME, 780. 783.

NECESSARIES.

See INFANT, II.

NEGLIGENCE.

See NEW TRIAL, 1.

NEWCASTLE-UNDER-LYNE.

1. Rights of Crown in duchy manor of, 584. n.

NEWSPAPER.

See LIBEL, 1.

NEW TRIAL.

I. *When granted.*

1. In an action on the case for an injury, in being thrown down upon iron instruments placed by the defendant in the highway; the defence set up was negligence on the part of the plaintiff, of which negligence no distinct evidence was given. It was left to the jury to say, whether the plaintiff had been so deficient in reasonable and ordinary care, that he had brought the injury upon himself.

A verdict having been found for the defendant, a rule for a new trial was refused on the ground of misdirection. *Marriott* v. *Stanley.* Page 568

2. But a rule was granted, on payment of costs, as upon a verdict against evidence; which rule was afterwards made absolute. *Ibid.*

II. *Practice upon.*

3. After a verdict for the plaintiff, and pending a rule for a new trial, the plaintiff dies. No cause can be shewn against the rule until the appointment of a personal representative. *Shoman* v. *Allen.* 96. (*c*).

4. Cause cannot be shewn on behalf of the attorney who claims a lien on the verdict for his costs. *Ibid.*

NISI PRIUS.

See PREROGATIVE, 1.

NOLLE PROSEQUI, 551.

NON ASSUMPSIT.

I. *When pleadable.* 792. (*a*).

II. *Proper form of pleading this plea.* *See* 512. (*a*).

NONJOINDER.

I. *Of parties as defendants.* 44. (*a*).

NOTARY PUBLIC.

See FINES AND RECOVERIES, 2.

NOTICE.

I. *Of distress.*
See IMPOUNDING, 1.

II. *Of dishonour.*
See BILLS AND NOTES.

III. *Of mortgage, given by mortgagee to tenant of mortgagor.*
See LANDLORD AND TENANT, 2.

IV. *Of objection.*
See LETTERS PATENT, 2.

NUISANCE.

See CASE, ACTION ON THE, 4.

NUL TIEL CUSTOM.

Replication of, Page 39. (*a*).

NUNQUAM INDEBITATUS.

See FRAUDS, STATUTE OF.

OBJECTION.

I. *To inventor's patent.* 249. (*a*).

II. *To vendor's title.*

See VENDOR AND PURCHASER, 5, 6.

OCCUPATION WAY.

See WAY, 1, 2.

OFFICER.

See MUNICIPAL CORPORATION ACT, 2.

OVERRULING DEMURRERS.

202. n.

OXFORD.

See INFANT.

Foreign attachment, in mayor's court of, 41. (*a*).

PAPER BOOKS.

See ERROR, 3.

PARTICULAR ESTATE.

See PLEADING, 10.

PARTICULARS OF DEMAND.

See BAILMENT, 1.

PARTNER.

I. *Partnership, how constituted.*

1. *A.* and *B.* agree to become partners from a subsequent day upon certain terms, which are to be embodied in a deed to be executed on such subsequent day. The deed is executed on a day later than that appointed. *B.* is bound by the contract of *A.*, entered into in the name of the firm, between the day appointed for the execution of the deed and that on which it was actually executed. *Battley* v. *Lewis.* Page 155

2. So, though alterations are introduced into the deed at the time of its execution. *Ibid.*

3. The plaintiff entered into an express contract with a committee of individuals associated together for the purpose of obtaining an act of parliament for making a turnpike road, to do certain work for a specified sum. He afterwards caused his name to be inserted in the list of subscribers for two shares.

Held, that he was not thereby precluded from recovering upon

such express contract. *Lucas* v. *Beach.* Page 417

II. *Rights of partners.*

4. *A.*, a manufacturer, contracts with *B.*, *C.*, and *D.*, who are partners occupying a mill, the property of *B.*, for the drying of his wool in a room in the mill, *B.*, *C.*, and *D.* effect an insurance on the mill, covering wool in the room. *D.* retires from the partnership; after which *C.* and *D.* have no interest in the room. *B.* and *C.* effect another insurance, also covering goods in the room. A dissolution of partnership takes place between *B.* and *C.*, which is not communicated to *A.* *C.* afterwards effects a similar insurance in his sole name, and *A.*'s wool being damaged by fire, the insurance office pays the proceeds of the damaged wool to *A.*, and the amount of loss on the wool to the extent of the sum insured thereon to *C.* Similar losses had been paid by the insurance office to the partnership, and by the partnership paid over to *A.* under the former policies: Held, that as it was not shewn that *B.* had authorised the effecting of the then policy, or that the partnership was bound to insure, an action for money had and received could not be maintained by *A.* against *B.* and *C.* jointly. *Armitage* v. *Winterbottom and Another.* 130

III. *Nominal partner.*

5. In an action by a tradesman for goods sold, his son is a competent witness for him, if, as between father and son, the son has no interest in the trade, although the trade be carried on in their joint names, and although, in a bill of parcels written by the son, and delivered with the goods, the defendant be made a debtor to the father and son jointly. *Barker* v. *Stubbs.* Page 44

IV. *Dormant partner.*

See ASSUMPSIT, 8.

PASSAGE COURT OF LIVERPOOL.

Custom of foreign attachment in,

See 41. n.

PATENT.

1. Notice of objection to, 249. (*a*).

2. Certificate that validity of, came in question. 249. (*b*).

PAYMENT.

I. *Appropriation of,*

See ATTORNEY.

II. *Application of plea of,*

See 245. (*b*).

III. *Of money into court.*

See MONEY BROUGHT INTO COURT.

PEDIGREE.

See RIGHT, WRIT OF.

PENAL ACTION.

I. *Compounding,*

1. Pending an action of ejectment on the demise of *A.* against *B.*, *A.* is served with notice of *B.*'s intention to sue for certain statutable penalties incurred by *A.* An ar-

rangement is made, under which the ejectment is discontinued, and *B.* receives from *A.* 50*l.* towards the costs of *B.*'s defence in that action. If the 50*l.* was paid with reference to, and by coercion of, the threatened penal action, and not voluntarily, and with reference to the ejectment only, *A.* may recover back the 50*l.* as money received by *B.* to *A.*'s use. *Unwin* v. *Leaper.* Page 747

2. So, although the arrangement contain terms which are performed by *B.*, the performance of which prevents *B.* from being restored to his original position, otherwise than by the intervention of a court of equity. *Ibid.*

PENDENCY OF SUIT,

Proof of, by order of court made in the cause. 289. (*a*).

PENTICE COURT AT CHESTER.

I. *Foreign attachment in,* 41. (*a*).

PERFORMANCE.

I. *How pleaded.*

1. Sufficiency of general allegation of, where the defendant demurs generally, or pleads over.

See PLEADING, 14.

II. *Dispensation with.* 173. n. 176. (*a*).

PER QUÆ SERVITIA, 129.

PERSONAL SERVICE.

See SERVICE.

PEWS.

See 514. n.

PLAINT.

See FOREIGN ATTACHMENT, 2.

PLEADING.

I. *Declaration.*

See ASSUMPSIT, 8.

1. By a contract between *A.* on the one part, and *B.* and *C.* on the other part, it was agreed that *A.* should serve *B.* and *C.* for seven years, if *B.* and *C.*, or either of them, should so long live. *A.* having subsequently discovered that, at the time of making the contract, *D.* was a dormant partner with *B.* and *C.*, declared upon the contract as an agreement to serve *B.* and *D.*, or the survivor of them:

Held, that the contract was misdescribed. *Beckham* v. *Knight and Another.* Page 738

2. *Semble,* that a declaration might have been framed, under which *D.* would have been made liable to *A.* under the agreement. *Ibid.*

3. In 1838 the occupier of a field called the *Hall Close,* took down the old fence, and added to the field a strip of land adjoining a public road.

In an action for a trespass committed upon the strip of land, about a year after it had been so taken in, the declaration described the *locus in quo* as the *Hall Close:*

Held, that it was properly de-

scribed. *Brownlow* v. *Tomlinson and Others.* Page 484

4. Where, by an agreement, concurrent acts are to be done by the plaintiff and the defendant, a declaration against the defendant for not doing the act on his part, should allege that the plaintiff was ready and willing *to do the concurrent act* on his part. But if the plaintiff merely allege that he was ready and willing *to perform the agreement* on his part, it is sufficient, if the defendant demur generally, or if he plead over. *Kemble* v. *Mills.* 757

5. Where a declaration in assumpsit describes the terms of the contract in language denoting that a particular act, which the plaintiff has engaged to do, is to be independent of, or concurrent with, an act or acts to be done on the part of the defendant, if, from the position of the parties, or from the nature of the agreement, such act is to be considered as intended to constitute a condition precedent, the proper course is, to plead non assumpsit, and give the special matter in evidence. Per *Maule* J. *Ibid.*

6. If the defence be specially pleaded, *semble*, that the plea will be bad on special demurrer, as amounting to the general issue,—*per eundem. Ibid.*

7. Want of notice of the dishonour of a cheque on a banker is sufficiently excused, *primâ facie*, by alleging that the banker had no effects of the drawer, and had received no consideration for payment of the cheque, and that the defendant had sustained no damages by reason of his having no notice of dishonour, — at least, upon general demurrer. *Kemble* v. *Mills.* Page 757

8. Where, in assumpsit, the promise of the defendant is alleged to have been made in consideration of a certain service to be performed by the plaintiff, *amongst other things*, the omission to specify the other branches of the consideration included under the term "other things," is no ground of nonsuit, unless, upon the production of the agreement in which such other branches of the consideration are specified, they appear to contain matter in the nature of a condition precedent.

Held: that, supposing the omission to be material, it is a variance, and therefore within the statute allowing amendments at nisi prius. *Clarke* v. *Morrell.* 841

9. If, in a declaration in assumpsit against husband and wife, it is alleged that the defendants promised, without stating whether the promise was made before or during the marriage, it is bad for uncertainty on special demurrer, per *Maule* J. *France and Another* v. *White and Others.* 731

10. But if the defendants merely plead, that the promise was made by the defendants and *C.* jointly, and not by the defendants alone, and a verdict is found for the plaintiff on an issue taken upon a

replication, stating that the promises were not made to the defendant and *C.* jointly, it will be presumed that the promise was made before the marriage; inasmuch as joint liability might then be created. *France and Another* v. *White and Others.* Page 731

II. *Rule to plead.*

See PRACTICE, 7, 8.

III. *Plea in abatement.*

See ASSUMPSIT, 7.

11. Non-joinder of co-promisee as a co-defendant. 44. n.

IV. *Plea in bar.*

12. *Quære*, whether, under the plea of non assumpsit, coverture existing at the time of the contract can be set up since the new rules of pleading, *R. H.* 4 *W.* 4. *Moss* v. *Smith.* 228

V. *Double pleading, under* 4 *Anne c.* 16.

13. The court will not allow a defendant to put special pleas on the record in addition to the statutable plea of the general issue. *Legge* v. *Boyd.* 897

14. Payment of money into court under 3 & 4 *W.* 4. *r.* 42. *s.* 1., and *R. T.* 1 *Vict. reg.* 17., in bar of the further maintenance of the action, cannot be pleaded to the same cause of action to which other pleas are pleaded in denial of the existence of that cause of action at the time of action brought. *Thompson* v. *Jackson.* 242

VI. *Double pleas, in apparent violation of the rule of pleading, H. T.* 4 *W.* 4. *r.* 5.

15. Pleas — that 200*l.*, part of the consideration for which the action is brought, was money lent, in the shape of counters, for the purpose of gaming, and that the 200*l.* was money lost at play at one time, — form distinct defences, although there may have been but one transaction, and are therefore not "in apparent violation" of the rule. *Temple* v. *Keily.* Page 904

VII. *Proper conclusion.*

See VENDOR AND PURCHASER, 5. VERIFICATION, 1.

VIII. *New assignment.*

16. In trover by assignees for a conversion, after the bankruptcy, of 400 bales and 400 bags of cotton, the defendant pleaded, as to the converting of 304 bales, parcel, &c., that they were purchased and paid for by *J. S.*, as agent for the bankrupts, and that they being insolvent, and having dishonoured his drafts, and the cottons coming to the hands of the defendant as owner of the vessel on board of which they were shipped, the defendants, by order of *J. S.*, stopped them *in transitu.* The plaintiffs newly assigned that they issued their writ, and declared thereupon, not for the supposed conversion in the plea mentioned, but for that the defendant converted and disposed of to his own use, divers bales of cotton "different to and other than the bales of cotton in the introductory part of this plea mentioned, to wit, 304 bales of cotton of great value,"

&c.: and also for that the defendant converted and disposed of the last mentioned bales of cotton "on other and different occasions and times, and for other and different purposes, and in another and different manner than in the said plea mentioned." To this new assignment the plaintiff pleaded not guilty: Held, that the new assignment might be considered as alleging another and a different conversion of the same subject-matter as that mentioned in the plea. *Brancker* v. *Molyneux.* Page 710

17. *Semble*, that a new assignment is not necessarily to be understood as admitting the truth of the facts alleged in the plea, and that it may, in some cases, be treated as nothing more than an assertion that the trespass or grievance which the plea attempts to justify is not the trespass or grievance in respect of which the plaintiff is seeking to recover. *Ibid.*

IX. *Departure.*

See 129. (*b*).

X. *Demurrer.*

See DEMURRER.

XI. *Puis darrein continuance.*

See 244. (*a*).

XII. *Other matters.*

18. The commencement of particular estates ought to be shewn. 126. n.

19. To an action of covenant brought by the plaintiff as administrator of *J. S.*, by virtue of letters of administration granted to him by the Archbishop of *Dublin*, upon a deed, whereby the defendant covenanted to pay an annuity, which he likewise charged upon lands in *Ireland*, the defendant (who was under terms to plead issuably) pleaded that *J. S.*, at the time of his death, was an inhabitant of and commorant within the city of *Dublin*, and had *bona notabilia* within the diocese of the Bishop of *London*.

Held, that the plea was not issuable, it not shewing that, at the decease of *J. S.*, the deed sued on was within the diocese of *London*. *Huthwaite, administrator*, v. *Phaire.* Page 159

20. If, in a pleading, subject *A.* is mentioned, and then subject *B.*, and afterwards a statement is made respecting "the last mentioned subject," the court will refer the words "the last mentioned" to *A.* where, by referring them to *B.*, an incongruity would be occasioned, and where the opposite party, instead of demurring on the ground of ambiguity, has pleaded over. Per *Tindal* C. J. and *Bosanquet* and *Coltman* JJ., *dissentiente Erskine* J. *Brancker* v. *Molyneux.* 710

21. Where an action on a promissory note, in which the consideration was expressed to be "for commission due to the plaintiff for business transacted for the defendant," the defendant pleaded that the real consideration for the note was, services to be *thereafter* rendered by the plaintiff, which

had never been performed, and the plaintiff replied *de injuriâ*: Held, that evidence in support of this plea was admissible, and ought to have been received by the judge at the trial. *Abbott* v. *Hendricks.* Page 791

22. As to the sufficiency of the plea, in which it was not alleged that the time for performing the services had elapsed, *quære*. *Cowan* v. *Braidwood.* 881

23. A plea alleges that the promise stated in the declaration was made by the defendants and one *C.* jointly, and not by the defendants only. This amounts to a sufficient confession of the declaration to entitle the plaintiff to judgment, after a verdict negativing the plea, semble. *France and Another* v. *White and Others.* 731

PLEDGES.

By distrainee, to make amends. 877. (*b*)

POLICY.

See INSURANCE.

POSSESSION.

I. *How proved.*

1. Upon a plea of "not possessed," in trover for ore, by the lessees of a mine, it is sufficient for the plaintiffs to prove their occupation of the mine from which the ore was dug, without shewing title in their lessors. *Taylor* v. *Parry and Others.* 604

2. Such occupation being proved, it is no objection to the right of the plaintiffs to a verdict on that issue, that the lease was not executed by all the parties named in the lease as lessors. *Taylor* v. *Parry and Others.* Page 604

3. The objection, if tenable, would only go in reduction of damages, per *Tindal* C. J. *Ibid.*

4. Under a demise of all mines and minerals lying under a large continuous tract of waste land, possession of the whole subject of the demise is proved by evidence of working under one part of the surface. *Ibid.*

5. Lien may be given in evidence under a plea, that the plaintiff was not possessed. *Brandão* v. *Barnett.* 908

II. *How to be obtained.*

6. Where a tenant remains in possession after the expiration of his term, a landlord is not justified in expelling him by force in order to regain possession. *Newton et ux.* v. *Harland and Another.* 644

POSTEA.

See PRACTICE, 123.

POUND-BREACH. 701. (*a*), 707. (*a*).

POWER.

See DEVISE, 2.
VENDOR AND PURCHASER, 4.

PRACTICE.

I. *Rules and orders.*
Vide infrà, 18.

1. Although the general practice be,

for one party to the suit to draw up a rule obtained in the progress of a cause, yet if the other party wish to act upon such rule, he should draw it up within the time to which it relates; for, if not drawn up within such period, it is to be considered as having been abandoned. *Gingell* v. *Bean.* Page 50

2. After a verdict for the plaintiff, and pending a rule for a new trial, the plaintiff dies. No cause can be shewn against the rule until there is a personal representative.

Cause cannot be shewn on behalf of the attorney, who claims a lien on the verdict for his costs. *Shoman* v. *Allen.* 96. (*c*).

3. On a motion for an attachment against an attorney for disobeying a rule of court, it is sufficient if it can be collected from the affidavit of service, that such rule has been personally served; it is necessary that the words "personal service" should be used in the affidavit. *Short* v. *Smith.* 211

4. The defendant having obtained a rule to set aside a judge's order for irregularity, which was drawn up without mentioning costs, the plaintiff consented to its being made absolute. The defendant, however, stating that he had abandoned the first rule, obtained a second for setting aside the order with costs. The court, after intimating that they would not have granted the second rule if they had been aware of the offer of the plaintiff, made the second rule absolute, the costs to be costs in the cause. *Jeves* v. *Hay.* Page 390

5. The court will not open a rule upon a suggestion by affidavit, that the report of the master upon which the court had acted in disposing of the rule, was erroneous. *Gingell* v. *Bean.* 555

6. The court will not issue an attachment against an attorney for not delivering up papers pursuant to a rule of court, unless it appear that the demand was by a party duly authorised to make it; and that the authority of the party making the demand, was shewn at the time of making it. *Doe dem. Hickman* v. *Hickman.* 566

7. A rule to plead may be entered before the delivery of the declaration, provided that both acts are done on the same day. *Chapman* v. *Davis.* 388

8. Where a rule to plead expires on a *Monday*, on which day the offices are in fact closed, because the *Sunday* preceding was the Queen's birth-day, the *Monday* is not excluded from the computation of time; and the defendant is bound to plead before the opening of the office on *Tuesday*. *Wilkinson* v. *Britton.* 557

9. Where a party has, bonâ fide, obeyed a rule or order so far as lay in his power, an attachment will not be granted, because the terms of the rule or order have not been strictly complied with. *Clarke* v. *Blakesley and Others.* 567

II. *Writ of summons.*

10. A writ of summons, indorsed

"The plaintiff claims 95*l.* 9*s.* 6*d.* for debt, and *l.* for costs," leaving the amount of the costs in blank, is irregular. *Truslove* v. *Whitechurch.* Page 426

11. A defendant served with a copy of a writ of summons, which writ, if truly copied, would be irregular, may move "to set aside the service of the writ." *Ibid.*

12. And in a case where it was not shewn whether the copy served was or was not a true copy, the court made such a rule absolute. *Ibid.*

III. *Staying proceedings.*

13. An order cannot be made for staying proceedings on payment of debt and costs, in an action for unliquidated damages. *Fisher* v. *Payne.* 265

14. Nor in an action to recover a sum due from a third person, with the costs of certain proceedings against that third person, the payment of which the defendant has guaranteed, per *Erskine* J. *Ibid.*

IV. *Reference to the master.*

15. Where, on the execution of a writ of inquiry, the parties agree to withdraw the case from the jury, and to submit it to the master under a judge's order, the master sits as an arbitrator appointed by the parties, and the court will not interfere with his finding as to the facts. *Ibid.*

V. *Notice.*

16. Service of a notice, by leaving it at the office of the attorney, with a laundress having the care of that and the other offices in the house, is not good service. *Brown* v. *Wildbore.* Page 276

VI. *Writ of nisi prius.*

17. The crown may forbid the awarding of a writ of nisi prius in a suit between subject and subject, in which the crown has an interest. *Paddock* v. *Forrester and Another.* 583

VII. *Notice of trial.*

18. A defendant served with a notice of trial by continuance, where no issue has been delivered and no original notice of trial has been served, omits to return the notice of trial by continuance, and gives no intimation to the plaintiff of the irregularity, for an unreasonable time, and until it is too late to correct it in time to go to trial at the same sittings; the irregularity is waived. *Brown* v. *Wildbore.* 276

VIII. *Assessment of damages.*

19. Where a verdict is found for the defendant upon an issue taken upon a plea pleaded in bar of the whole action, the jury cannot assess contingent damages for the plaintiff, without the assent of the defendant. *Newton et ux.* v. *Harland and Another.* 644

IX. *Other matters.*

20. A communication to or by the counsel of *A.*, from or to the attorney of *B.*, respecting the proceedings in a cause between *A.* and *B.*, which takes place out of court, is not binding upon *A.* *Richardson* v. *Peto.* 895

21. Where, therefore, pending a rule nisi, the attorney served with the rule apprehended, from a conversation out of court with the counsel who had moved the rule, that the latter would forbear to move to make it absolute for a certain time, and the rule was made absolute by that counsel within the time mentioned, the court refused to re-open it. *Richardson* v. *Peto.* Page 895

22. Reports having reached this country of the death of the plaintiff abroad, the court, on the application of the defendant, made absolute a rule for postponing the trial until the court or a judge should direct it to proceed, the attorney for the plaintiff having given notice that he did not mean to oppose the motion. *Chesser* v. *Ridgway.* 955

23. Where a party complaining of an erroneous entry of the verdict on the postea, the proper course is to apply to the judge who tried the cause to amend the entry by his notes. Where this course has been taken, and the judge has refused to make any order, the court will not interfere. *Newton et ux.* v. *Harland and Another.* 6

PREBEND. (*a*)

See MORTGAGE, 3.

(*a*) Exemplificatio cujusdam petitionis, et responsionis ad eandem factæ in ultimo parliamento, continentis, viz. quod liberum tenementum præbendariorum in ecclesiis cathedralibus, reputabitur inesse in decano et capitulo ejusdem ecclesiæ. *Calend. Rot. Pat.* (50 *Edw.* III.) fo. 192. *b.*

5. In suits relating to churchwardens' accounts. Page 534. n.
6. In suits relating to the occupation of pews. *Ibid.*

PROMISSORY NOTE.
See BILLS AND NOTES.

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See 288. n.

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PURCHASER.
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See CASE, ACTION ON THE, 1.

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RECORD IN ERROR,
How made in *London*. 539. (*b*)

RECORDER OF LONDON,
1. Certificate of customs of *London*, to be made by mouth of. Page 539. (*b*)
2. So, record in error. *Ibid.*

RECOVERY.
I. *Amendment of,*
See FINES AND RECOVERIES, 2.

RE-ENTRY.
I. *By lessor.*
1. Whether the service of a declaration in ejectment upon one of several subtenants of a lessee, followed up by judgment against the casual ejector, executed against that subtenant by *habere facias possessionem*, is evidence of an election on the part of the lessor to avail himself of a clause of re-entry, *quære*. *Long* v. *Bilke*. 87

REGISTRATION.
I. *Of officers.*
1. Of unincorporated company, authorised by letters patent to sue and be sued in name of such officers. 253. n.
II. *Of shareholders.*
See MONEY HAD AND RECEIVED, 3, 4.

RELEASE, PLEA OF. 225. n.

REMAINDER.
See DEVISE.

REMITTITUR DAMNA.
See 288. n.

RENT.

I. *Apportionment of,*

1. In replevin against the assignee of the reversion of part of the premises demised, the defendant may avow at common law, stating the facts specially, and leaving the apportionment of the rent to be made by the jury. *Roberts* v. *Snell.* Page 577
2. Or he may avow in the general form given by 11 *G.* 2. *c.* 19. *s.* 22., as upon a holding at a certain rent. *Ibid.*
3. And if he avow under the statute, either for the entire rent, or with a deduction from the entire rent, greater or less than the proportion properly belonging to his interest in the reversion, the judge may direct the avowry to be amended, either by converting it into an avowry at common law, or (leaving it as an avowry under the statute), by describing the rent in conformity with the proportionate value of the respective parts into which the reversion has been divided. *Ibid.*
4. Land in the possession of a tenant for years is sold by the reversioner and conveyed by deed. The right of the purchaser, as assignee of the reversion, to receive the whole rent for the current quarter, cannot be controlled by a contemporaneous parol agreement, to apportion the quarter's rent between vendor and vendee, *Flinn* v. *Calow.* 589

REPLEGIANDO, HOMINE.

Writ of, Page 541. n.

REPLEGIARI FACIAS

1. Of men. 541. n.
2. Of lands. *Ibid.*
3. Of franchises.* *Ibid.*

REPLEVIN,

I. *Where it lies.*

See 577, 578. n.

1. Replevin of wool, seized by the King's officer to satisfy taxes. 549. n.
2. Replevin of liberties or franchises seized into the King's hands (*a*). 541. n.

II. *How distinguished from trespass.*

See 577. (*a*).

III. *Replevin or detinue.*

See Page 578. n.

IV. *Replevin or trover.*

See 578. n.

V. *In the detinet or in the detinuit.*

3. Replevin by prescription in inferior court, to be in the detinet. 546. (*b*).

And see 577. n.

VI. *Jurisdiction in,*

4. Prescription, to have conusance of, 577. n.
5. Power of granting replevins, out of court. 546. (*b*).
6. A replevin bond may be taken

* The mayoralty of *London*, seized by King *Edward* II., was replevied. *Cal. Rot. Pat.* 91. *b.*

and assigned by any officer who has power to grant replevins. *Thompson* v. *Farden.* Page 535

7. Held, that one of the sheriffs of *London* has such power without his companion; and may therefore take and assign replevin bonds. *Ibid.*

VII. *Pleadings in, upon distress for rent.*

8. In replevin against the assignee of the reversion of part of the premises demised, the defendant may avow at common law, stating the facts specially, and leaving the apportionment of the rent to be made by the jury; or he may avow in the general form given by 11 *G.* 2. *c.* 19. *s.* 22. as upon a holding at a certain rent, or with a deduction from the entire rent greater or less than the proportion properly belonging to his interest in the reversion; the judge at nisi prius may direct the avowry to be amended, either by converting it into an avowry at common law or leaving it as an avowry under the statute, by describing the rent in conformity with the proportionate value of the respective parts into which the reversion has been divided. *Roberts* v. *Snell.* 577

9. *Semble*, that the judge, or the court substituted by consent of parties for the judge at nisi prius, may make such amendment, although first prayed for after the verdict is delivered, and before it is recorded. *Ibid.*

VIII. *Pleadings in, upon distress for damage feasance.* Page 246

REPORT, MASTER'S.

See PRACTICE, 1.

REPUTED OWNER.

See BANKRUPT.

REQUEST.

See BOROUGH, 1.

I. *In pleading.*

1. Not necessary, to support a promise, where the consideration is executory. 265. (*b*)

RESOLUTION.

See JOINT STOCK COMPANY.

RESTRAINT OF TRADE.

See TRADE, 1.

RETURNING OFFICER.

See 263. (*p*).

REVERSAL OF JUDGMENT.

See BAIL IN ERROR, 1.

REVERSION.

See 357. DEVISE, 2. RENT, 1, 2, 3, 4.

RIGHT, WRIT OF.

I. *Verdict.*

1. On the trial of a writ of right, in which the mise was joined on the

mere right, the court left three matters of fact to the grand assize; first, whether the female demandant had made out her pedigree; secondly, whether, at the time of the levying of a fine, the conusor had an estate of freehold in the premises on which the fine could operate; and thirdly, whether he was then known by the name (*William Selby*) in which the fine was levied.

The grand assise found a general verdict for the tenant, and delivered in a written statement in the following terms: — "It is the unanimous verdict of the grand assise, that the demandant has not made out her pedigree; that the conusor had entered into and was in the actual possession of the estates devised by the will of *T. J. Selby* before and at the time of the levying the fine in 1784; and that he had taken and used, and was then known by, the name of *William Selby*."

Held, that the written statement could not be introduced into a bill of exceptions, tendered on the part of the demandant to the ruling of the court on the foregoing questions of fact; the statement being the opinion of the jury on points preliminary to their verdict, which points they were not called upon by law to find. *Davies and Wife, Demandants*, v. *Lowndes, Tenant.* Page 473

RULES.

I. *Of benefit society.*
See BENEFIT SOCIETY, 1.

II. *Of court.*
See ATTACHMENT, II.
PRACTICE, I.

III. *Service of,*
See PRACTICE, 3.

IV. *Shewing cause against,*
See PRACTICE, 2.

V. *Re-opening,*
See PRACTICE, 5.

SAISIES-ARRETS.

Attachment of goods, by process of, in *France.* Page 42. n.

SALE.

See VENDOR AND PURCHASER.

SALE OR RETURN.

See 989.

SCOTLAND.

I. *Scotch decree.*
1. Action upon. *Cowan* v. *Braidwood.* 882

II. *Scotch bankruptcy.*
2. Effect of.

SECONDARIES OF LONDON.

545. n.

SECRETARY.

See AMENDMENT, 1.
JOINT STOCK COMPANIES, 1.
STAMP, 2.

SEPARATION, DEED OF.
See PLEADING, 11.

SEQUELS OF VILLEINS, 118. n.

SERJEANT AT LAW.
See SOLICITOR-GENERAL.

SERJEANTS, NEW.
See 737.

SERVANT.
See ASSUMPSIT, 10.

SERVICE.

I. *Of rules.*
See PRACTICE, 11. 16.

1. On a motion for an attachment against an attorney for disobeying a rule of court, it is sufficient if it can be collected from the affidavit of service, that the rule has been personally served. *Short* v. *Smith.* Page 211
2. It is not necessary that the words "personally served" should be used in the affidavit. *Ibid.*

SET-OFF.
See BANKRUPT, 6.

I. *Replication of statute of limitations to plea of,*

1. The defendant having a claim against the plaintiff, the latter, at the foot of his bill of costs, acknowledged the debt as follows,—"By Mr. *Lacy*'s bill," leaving a blank for the amount. He then wrote below, "Agreeably to your request, above I send you my bill, which I will thank you to peruse, and, if correct, favour me with a bill for the balance." Held, that this was a sufficient acknowledgment of the defendant's claim to take it out of the statute of limitations. *Waller* v. *Lacy.* Page 54

SHERIFFS OF LONDON.

1. Judicial functions of, 545. n.
2. Ministerial functions of, *Ibid.*

SHIP.
See TROVER, 2.

I. *Construction of charter-party.*

1. A memorandum of charter provided that a vessel should ship goods for *Jamaica*, and having discharged the same, should receive on board a cargo from thence, or from a port on the *Spanish Main* if required, and deliver the same at a port in the United Kingdom, on being paid freight 250*l.* in ten days after sailing from *Gravesend*, and 750*l.* more in two months after a right delivery of the homeward cargo, provided he should be required to proceed to one port only in *Jamaica*, and 25*l.* more should he be required to go to two or more ports in that island; and in case the vessel should be ordered to the *Spanish Main*, 4*l.* per day was to be paid for every day after the twenty-fifth after her arrival at *Jamaica* until dispatched from her loading port. Demurrage 100*l.* per month, or in proportion for a less period, payable on settlement of the line of the vessel.

In assumpsit on a memorandum of charter, the declaration averred that the vessel, after discharging a portion of her outward cargo at certain ports in *Jamaica*, sailed thence to a port in the *Spanish Main* to receive a homeward cargo, and was detained there 139 days after the twenty-fifth day of her arrival at *Jamaica*, and alleged for breach the non-payment of the 4*l.* per day for the 139 days. Plea: that the vessel had not delivered her homeward cargo at any port of discharge in the United Kingdom.

Held, on demurrer to the plea, that the 4*l.* per day was not payable until two months after the delivery of the homeward cargo. *Crozier* v. *Smith.* Page 407

SHORT HAND WRITER'S NOTES.

See COSTS, 7.

SHRIEVALTY.

I. *Of Middlesex.*

1. Is in suspense on death of one sheriff. 545. n.

II. *Of London.*

2. Whether in suspense on death of one sheriff, *quære.* 545. n.

SICK MEMBERS.

See BENEFIT SOCIETY, 2.

SIMILITER.

See FOREIGN ATTACHMENT, 4.

SINGLE BILL.

1. Infant may bind himself by obligation under seal without a penalty. Page 551. (*b*)

SOLICITOR GENERAL.

Party discharged from the office of serjeant in order to render him capable of serving the crown in the office of solicitor-general. 588. n.

SPECIAL JURY.

See COSTS, 7.

STAMP.

See TRIAL, 1.

I. *Agreement stamp, where necessary under 55 G. 3. c. 184.*

1. By a memorandum signed by *A.* and *B.*, it is agreed that a question of boundary between them shall be referred to some indifferent surveyor residing at a distance. By a further memorandum written on the same paper, and signed by the same parties, at a subsequent day, it is agreed that the question shall be settled by *C.* Held, that the two memorandums constitute one agreement, and require only one stamp. *Taylor* v. *Parry and Others.* 604

2. A resolution, signed by the members of an unincorporated association, for the appointment of a secretary to the association, does not require a stamp. *Vaughton* v. *Brine.* 359

3. A minute of a resolution come to by a committee, that a tender for work was accepted, is not a minute or memorandum of an agreement requiring a stamp. *Lucas* v. *Beach.* Page 417
4. But a minute of a resolution which purported on the face of it, to be an agreement that the plaintiff should have an additional sum for the extra trouble imposed on him by a deviation from the original line of road, and which was read over to the plaintiff, and was assented to by him, requires an agreement stamp. Per *Rolfe* B. at nisi prius. *Ibid.*

II. *Upon attorney's admission.*
See BILLS AND NOTES, 4.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See 755. (*a*).

I. *New promise.*

1. *A.* having a claim against *B.*, *B.* at the foot of his bill of costs acknowledged the debt as follows, —"By *A.*'s bill," leaving a blank for the amount. He then wrote below, "Agreeably to your request, above I send you my bill, which I will thank you to peruse, and, if correct, favour me with a bill for the balance." Held, that this was a sufficient acknowledgment of *A.*'s claim to take it out of the statute. *Waller* v. *Lacy.* 54

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Whether provisions in, to be regarded as essential, or as directory only. Page 448. 599. (*e*)

II. *How pleaded.* 909. *a.*

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1. An order for staying proceedings, upon payment of debt and costs, cannot be made in an action for unliquidated damages. *Fisher* v. *Pyne and Another.* 265
2. Nor in an action upon a guarantee. *Ibid.*

STET PROCESSUS.

See JUDGMENT, 6. 8.

STOCK.

Made personal property by special enactment. 993

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SUBPŒNA.

See WITNESS, 3.

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See EJECTMENT, 7.

SUFFERANCE, TENANT AT.

See TRESPASS, 8, 9.

SUGGESTION.

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I. *Pendency of,*

1. Whether proved, by order of court, made in the cause. 289. (*a*)

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See BOROUGH, 2.

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Shrievalty, when in,
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TAXATION OF COSTS.

See ARBITRAMENT, 1.
COSTS.

TAXES.

See FIFTEENTH.

TENANT.

See LANDLORD AND TENANT.

TENANCY.

I. *In tail.*
See DEVISE, 3.

II. *For life.*
See DEVISE, 3.

III. *For years.*
See EVIDENCE, 1.
RENT, 4.

IV. *By estoppel.* 126. (*b*).

V. *At sufferance.*
See FORCIBLE ENTRY, 1.

TENDER

I. *Of amends.* 225. n.

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II. *Of debt.* *See* Page 273.

1. Distinction between a tender and payment of money into court. 878. n.

III. *Of conveyance.*
See 193. n.

TESTAMENTARY CAUSES.

I. *Prohibition in,*
See ADMINISTRATION, 2.
PROHIBITION.

TIME,

Agreement to give, where binding. 513. n.

TIME, COMPUTATION OF, 755. n.

TITHES.

I. *Proceedings under commutation act.*

1. An award being made by an assistant tithe-commissioner, under 6 & 7 *W.* 4. *c.* 71., with respect to certain alleged district moduses, the vicar brought an action against one of the landowners, and seventy-four of the landowners brought actions against the vicar, in order to try the disputed rights under issues to be directed pursuant to the statute.

The court refused to order the seventy-four actions brought against the vicar to abide the event of the action brought by him. *Ward, Clerk,* v. *Pomfret.* 559

TITLE.

I. *Making out a good title, where a condition precedent.*

See VENDOR AND PURCHASER, 3.

II. *Objections to,*

See VENDOR AND PURCHASER, 5, 6.

III. *Misconveyance of,*

See Page 16. (*a*).

TOLL.

See BRIDGE, 1.

TOLZEY COURT.

1. Proceedings in prescriptive customary court of *Bristol*, so called. *Bruce* v. *Wait.* 1

TOWER OF LONDON.

I. *Proceedings in court of.*

1. By concessit solvere. 8. (*a*).
2. By plaint of trespass and assault, *Ibid.*

TOWN COUNCIL.

See BOROUGH, 1.

TRADE.

See COVENANT, 7.

I. *Contracts in restraint of,*

1. A covenant covenanting that *A.* will not, during the continuance of a demise, made by him of a brewery, carry on the business of a brewer, or of a merchant, or agent for the sale of ale, &c., or, in any other manner howsoever, be concerned in the said business, was held to be void. *Hinde and Others* v. *Gray.* 195

II. *Offensive,*

See CASE, ACTION ON THE, 5.

TRAVERSE.

See VENDOR AND PURCHASER, 5.

TRESPASS.

I. *To the person.*

1. In an action for false imprisonment, where a verdict with 200*l.* damages was given for one night's confinement in a prison, evidence of a trespass by the defendant on the goods of the plaintiff, arising out of the same transaction, committed on the following day, was admitted, for the purpose of shewing that the defendant was actuated by malice: Held, to be no ground for granting a new trial. *Edgell* v. *Francis.* Page 222

2. The defendant having, in mitigation of damages, adduced evidence of the state of accounts between himself and the owners of a fund which the plaintiff was removing under an irregular order, at the time of his being given into custody, and the jury having been told that the fact shewn was no mitigation of the defendant's conduct, the defendant's witnesses were allowed to be cross-examined as to bill transactions between the defendant and the owners of the fund, for the purpose of negativing the state of accounts set up by the defendant, although it was objected that such an inquiry could not be gone into unless the bills were produced: Held, to be no ground for granting a new trial. *Ibid.*

II. *Quare clausum fregit.*

3. Where a tenant remains in pos-

session after the expiration of his term, a landlord is not justified in expelling him by force in order to regain possession. *Newton et ux.* v. *Harland and Another.* Page 644

4. *Semble*, that possession so acquired is not sufficient to vest the possession in the landlord with relation to the termination of the term. *Ibid.*

5. The occupier of a field called the *Hall Close* took down a fence, and added to the field another strip of land. In declaring for a trespass committed upon this strip of land about a year after it had been so taken in, the locus in quo is properly described as the *Hall Close*. *Brownlow* v. *Tomlinson.* 484

III. *De bonis asportatis.*

6. Distinction between trespass and replevin. 577. (*a*).

TRIAL.

See 239.

I. *Notice of,*

See PRACTICE, VII.

II. *Course of proceedings at,*

See CASE, ACTION ON THE, 3, 4, 5, 6, 7.

VERDICT, 3.

WARRANTY.

1. Where a plaintiff closes his case without its appearing that there is any written contract relating to the subject-matter of the action, the defendant, if he means to set up that there is such a contract, must produce it properly stamped, so as to be receivable in evidence. *Magnay* v. *Knight.* 944

2. And it makes no difference that the plaintiff has had notice to produce the document. *Magnay* v. *Knight.* Page 944

3. A misstatement by one of the plaintiff's witnesses, on a matter foreign to the question at issue between the parties, is no ground for a new trial. *Ibid.*

III. *Writ of,*

See AMENDMENT, 1.

TROVER.

I. *Where the proper form of action.*

See 578. n.

II. *Pleadings in,*

1. In trover for ore brought by lessees of a mine, it is sufficient under a plea of "not possessed," to shew occupation of the mine, without proving title in their lessor. *Taylor* v. *Parry and Others.* 604

2. In trover, by assignees for a conversion after the bankruptcy, of 400 bales and 400 bags of cotton, the defendant pleaded, as to the converting of 304 bales, parcel, &c., that they were purchased and paid for by *T. S.* as agent for the bankrupts, and that they being insolvent, and having dishononred his drafts, and the cottons coming to the hands of the defendant, as owner of the vessel on board of which they were shipped, the defendants, by order of *T. S.*, stopped them in transitu. The plaintiffs newly assigned, that they issued their writ and declared thereupon, not for the supposed conversion in the plea mentioned, but for that the defendant con-

verted and disposed of to his own use, divers bales of cotton, "different to and other than the bales of cotton in the introductory part of this plea mentioned, to wit, 304 bales of cotton of great value," &c.; and also, for that the defendant converted and disposed of the last mentioned bales of cotton, "on other and different occasions and times, and for other and different purposes, and in another and different manner than in the said plea mentioned." To this new assignment the plaintiff pleaded not guilty. Held, that the new assignment might be considered as alleging another and a different conversion of the same subject-matter as that mentioned in the plea. *Brancker* v. *Molyneux*.

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UNDERSHERIFF OF MIDDLESEX, 545. n.

UNDERTENANT.

See EJECTMENT, 7.

USE AND OCCUPATION.

1. Computation of recompense for, 312. n.
2. What hereditaments the subject of.

USES.

See 282. n. MORTMAIN, 2.

VARIANCE.

See AMENDMENT.
ASSUMPSIT, 10.
PLEADING, 20.

VENDOR AND PURCHASER.

I. *Of personal property.*

See WITNESS, 1, 2.

1. To a declaration for goods sold and delivered, and work done and materials provided at the defendant's request, a plea that the goods were sold to the defendant as the agent and broker of *A.*, to whom the plaintiff consigned the goods, and that the work and materials were done and provided in and about the shipping and consigning of the goods to *A.*, is bad, as not shewing that the work and materials were not done and provided on the defendant's credit. *Crawshay* v. *Barry*.

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2. In debt for goods bargained and sold, it is open to the defendant, under a plea of nunquam indebitatus, to take the objection that the contract is void by the seventeenth section of the statute of frauds. *Fricker* v. *Thomlinson*. 772
3. But, *semble*, that the objection is answered by shewing an acceptance and actual receipt of part of the goods, even after action brought. *Ibid.*

I. *Of real property.*

4. By an agreement between the plaintiffs and defendants, after reciting that the plaintiffs had ad-

vertised for sale by auction certain collieries and other property, under a power contained in certain mortgage securities, in which collieries and other property two of the defendants were or claimed to be incumbrancers, and that the plaintiffs at the request of the defendants, and for the considerations after mentioned, had agreed to postpone the sale; it was (among other things) stipulated, that the accounts of the plaintiffs should be taken in the manner therein mentioned, and that the amount found due to them, not exceeding 20,000*l.*, should be secured to be paid to them by the deed of covenant of the defendants by three instalments, the first of which was to be paid at four months from the date of the agreement; that the collieries, moneys due for coals, and stock of coals on the wharf, should be given up to the defendants; that, on payment of the first instalment, the whole of the property comprised in the securities held by the plaintiffs (except the collieries) should be conveyed to the defendants, and that the deed of covenant should be forthwith prepared and executed by all parties within twenty-one days from the date of the agreement.

In assumpsit by the plaintiffs on the agreement, the declaration alleged that the plaintiffs were interested in the collieries and other property, as mortgagees thereof, under and by virtue of certain mortgage securities, and were in possession of the collieries, and were possessed of large quantities of coal then lying upon a certain wharf, and that certain sums were due to them for coals before then sold, in which collieries and other property two of the defendants were, or claimed to be interested as incumbrancers; and that the plaintiffs had advertised, for sale by auction, their interest in the said collieries and other property under a power lawfully authorising them in that behalf, and contained in the said mortgaged securities. The declaration, after setting out the agreement, assigned for breach a refusal by the defendants to execute the deed of covenant.

Held, on special demurrer, that the parties did not stand in the relation of vendors and purchasers; and that the making out of a good title to convey, was not a condition precedent to the right of the plaintiffs to call upon the defendants to execute the deed of covenant. *Hallewell and Another* v. *Morrell and Others.* Page 367

5. Held, also, that the interest of the plaintiffs was sufficiently alleged; and that the allegation, that the plaintiffs were about to sell their interest in the collieries and other property under a power, was not repugnant or inconsistent, the word "power" being to be understood in its popular, and not in its technical sense. *Ibid.*

6. On the sale by auction of certain property, the conditions of sale provided that the vendors should, within twenty days after the sale,

deliver an abstract of title, and that all objections thereto which should not be taken in writing within ten days afterwards, should be considered as waived.

In an action by the purchaser against the vendors for breach of the conditions of sale, the latter pleaded that, within twenty days after the sale, they delivered an abstract, but that the plaintiff did not, within ten days afterwards, take any objection to the title in writing. The plaintiff replied, that although the defendants did within twenty days deliver an abstract, yet that they did not by the said abstract disclose "a good and sufficient title," and that the plaintiff did, within ten days after the delivery of the abstract, take objections to the title in writing: concluding to the country. Held, that the replication did not introduce new matter, but amounted to a traverse of the latter allegation in the plea, and therefore properly concluded to the country. *Smith* v. *Tanner*. Page 802

And see TENDER, III.

VENIRE FACIAS AD ATTORNANDUM, 129. n.

VERDICT.

I. *Mistake in,*

See COSTS, 14.

1. To induce the court to grant a new trial, on the ground of excessive damages, it must be shewn that they are very excessive, or that a perverted view of the case has been taken by the jury. *Edgell* v. *Francis*. Page 222

2. Form of entering verdict in debt on simple contract, where part found for plaintiff and part for defendant. 751. n.

II. *Perverse verdict.*

Vide INFANT, 1. *suprà*, 1.

III. *Practice upon finding,*

3. When upon an issue on a plea in bar of the action, a verdict is found for the defendant, the jury cannot, without the assent of the defendant, assess contingent damages for the plaintiff. *Newton and ux.* v. *Harland and Another*. 644

IV. *In a writ of right.*

4. Special finding, when inadmissible, where mise joined upon the mere right. *Davies and Wife, Demandant; Lowndes, Tenant*. 473

V. *Judgment non obstante veredicto.* 792. (*a*).

VERIFICATION.

1. Unnecessary to verify, (or aver,) pleadings in which, although new matter is stated, it is matter which it does not lie on the party pleading it to prove. 286. (*a*), 754. n., 759

VILLEINS.

Sequels, or *sequaces*, of, 118. n.

WAIVER

See IRREGULARITY, 1.
MONEY HAD AND RECEIVED, 4.
VENDOR AND PURCHASER, 5, 6.

WARRANT.

See BOROUGH, 4, 5, 6.
JUSTICE OF THE PEACE.

WARRANTY.

Given in evidence, though not pleaded. Page 480. (*a*)

WASTE.

See 129.

WASTES.

See DEMISE, 1.

WAY.

I. *Highway.*

See CASE, ACTION ON THE, 1.
TRESPASS, 5.

1. An occupation way does not, on becoming a highway, cease to be an occupation way. Per Lord *Denman* C. J. at Nisi Prius. *Brownlow* v. *Tomlinson and Others.* 484

2. There may, therefore, be a highway and an occupation way over the same ground. *Ibid.*

And see BRIDGE, 1, 2.

WIFE.

See BARON AND FEME.

WILL.

See ADMINISTRATION, 2.
DEVISE.

WINDSOR.

I. *Canonry in free chapel of,*

See MORTGAGE, 3.

WITNESS.

See TRIAL, 3.

I. *Competency of,*

1. In an action by a tradesman for goods sold, his son is a competent witness for him, if, as between father and son, the son has no interest in the trade, although the trade be carried on in their joint names. *Barker* v. *Stubbs.* Page 44

2. So, although, in a bill of parcels written by the son, and delivered with the goods, the defendant be made a debtor to the father and son jointly. *Ibid.*

II. *Attendance of,*

3. A witness who was duly served with a subpœna, but who received no conduct money, accompanied the plaintiffs to the assize town, and lived with them while there. On the morning of the trial she refused to go to court to give evidence, unless 9*l.* (which was an unreasonable sum) was paid to her: Held that the plaintiffs, not having tendered her a reasonable sum to convey her home, were not entitled to an attachment against her for not obeying the subpœna. *Newton and Wife* v. *Harland and Another.* 956

WORDS.

I. *Of reference, construction of.*

1. "Last-mentioned," whether necessarily to be understood of the next immediate antecedent.

2. Ambiguous expressions.
Page 732.n.

II. *Defamatory language.*

3. To be stated in declarations, *in ipsissimis verbis*, and not according to their effect. 282. n.

4. Libel for, in ecclesiastical courts. 519. n.

WRIT.

I. *Of attachment.*
See ATTACHMENT.

II. *Of certiorari.*
See 17, 18, 19, 20, 21, 22, 23, 24. 17 (*a*), 18 (*c*). 20 (*a*).

III. *Of distringas ad respondendum.*
See DISTRINGAS.

IV. *Of distringas ad attornandum.*
See 129. *a.*

V. *Of error.*
See ERROR.

VI. *Of false judgment.*
See FALSE JUDGMENT.

VII. *Of habeas corpus.*
See 19. 21.

VIII. *Of habere facias possessionem.*
See 88. EJECTMENT, III.

IX. *Of homine replegiando.*
See 541. n.

X. *Of inquiry.*
See PRACTICE, 15.

XI. *Of mandamus.*
See 95.

XII. *Of nisi prius.*
See PRACTICE, 6.

XIII. *Of per quæ servitia.*
See Page 129. n.

XIV. *Of procedendo.*
See 18. (*a*).

XV. *Of prohibition.*
See ADMINISTRATION, 2. PROHIBITION.

XVI. *Of quem redditum reddit.*
See 129. n.

XVII. *Of quid juris clamat.*
See 129. n.

XVIII. *Of replegiari facias, or replevin.*
See REPLEGIARI FACIAS.
And see 577. (*b*), 578. n.

XIX. *Of right.*
See RIGHT.

XX. *Of subpœna.*
See WITNESS, 2.

XXI. *Of summons.*
See PRACTICE, II.

XXII. *Of supersedeas.*
See 37.

XXIII. *Of trial.*
See AMENDMENT, 1.

XXIV. *Of venire facias ad attornandum.*
See 129. n.

XXV. *Of waste.*
See 129. n.

WYGMORE.

Liberty of, seized and replevied. 541. n.

END OF THE FIRST VOLUME.

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